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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SURESH GANDOTRA and RITA GANDOTRA,

Petitioners,

v.

CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California Court of Appeal properly found no violation of the Excessive Fines Clause of the Eighth Amendment in the imposition of multiple statutory fines and penalty assessments that totaled $237,350, the maximum possible under California law for petitioners' offenses, on the grounds that this aggregate fine did not "shock public sentiment and violate the judgment of reasonable people about what is right and proper" and "the punishment thus imposed is not the fault of the law but of the one who violates it," without consideration of whether that fine was excessive in relation to the nature of the crimes and petitioners' culpability, the extent of their criminal gain, and their ability to pay that amount?

PARTIES TO THE PROCEEDINGS

Petitioners are Suresh Gandotra, M.D., and his wife Rita Gandotra, defendants before the Superior Court for the State of California in and for Los Angeles County and appellants below. Respondent is the People of the State of California, plaintiff and respondent below, represented by the Attorney General of California. There are no other parties to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

This case raises important questions concerning the application and contours of the Eighth Amendment's Excessive Fines Clause.

OPINION BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, Division One, is partially reported at *People v. Gandotra*, 11 Cal.App.4th 1355, 14 Cal.Rptr.2d 896 (1992) and is reproduced as an Appendix to this petition, A2-A53. The order of the California Supreme Court denying review of the Court of Appeal's decision is unreported; it also is appended. A1.

JURISDICTION

The judgment of the California Court of Appeal was filed on December 23, 1992. The California Supreme Court denied the petition for review on April 21, 1993. Under California law, the judgment of the Court of Appeal became final upon the Supreme Court's denial of review. Cal. Rules of Court, R. 24, 25, 28. This petition is timely filed within 90 days of finality, after obtaining an order from Justice O'Connor granting petitioners a 30-day extension of time within which to file the petition. Application No. 38. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code section 1257, subdivision (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed. . . . "

STATEMENT OF THE CASE

A. Procedural Background

Petitioners Suresh Gandotra, M.D., and his wife Rita Gandotra were charged in a 17-count information, filed on May 19, 1989, in the Superior Court of the State of California for the County of Los Angeles (Case No. A481115), as follows:

With respect to Dr. Suresh Gandotra, the People of the State of California charged four felony counts of aiding and abetting the forgery or alteration of a prescription in violation of California Business and Professions Code section 4390 (Counts I, III, V & VII); two misdemeanor counts of aiding and abetting the practice of

medicine without a certificate, *id.*, § 2052 (Counts II & IX); one misdemeanor count of aiding and abetting the distribution of a dangerous drug without a prescription, *id.*, § 4227 (Count IV); two felony counts of aiding and abetting the issuance of a prescription for a controlled substance in violation of Cal. Health and Safety Code section 11153(a) (Counts VI & X); one felony count of aiding and abetting the furnishing of a controlled substance – to wit, Tylenol with codeine #3, *id.*, § 11352 (Count VIII); five felony counts of presenting false Medi-Cal claims in violation of California Welfare and Institutions Code section 14107 (Counts XI, XII, XIII, XIV & XV); one felony count of grand theft in violation of California Penal Code section 487(1) (Count XVI); and one felony count of conspiring to defraud, *id.*, § 182(4) (Count XVII). Clerk's Transcript 863-877 ("CT"); A4-A5.

Rita Gandotra was charged with three counts of aiding and abetting the presentation of false Medi-Cal claims, Cal. Welf. & Inst. Code § 14107 (Counts XI, XII & XV); one count of grand theft, Cal. Pen. Code § 487(1) (Count XVI); and one count of conspiring to defraud, *id.*, § 182(4) (Count XVII). CT 869-877; A4.

Petitioners were arraigned on May 19, 1989, and pleaded not guilty. CT 881-882. Jury selection and trial commenced on February 21, 1990, before the Honorable Charles E. Frisco, Judge of the Los Angeles County Superior Court. CT 895. The trial lasted approximately 17 days, with the jury finally being instructed on March 20, 1990. See CT 895-920. After two and one-half days of deliberations, the jury returned guilty verdicts on all charges against each defendant. CT 920-922, 1037-1063.

Petitioners were sentenced on May 30, 1990. CT 1066-1069. Dr. Suresh Gandotra was denied probation, and the court pronounced the following sentence:

"Defendant ordered imprisoned in STATE PRISON for a total of 16 months.

"Court selects the low term of 16 months for the base term as to Count XI (14107 WIC).

"Sentence as to all counts determined as follows:

"All County Jail and State Prison time to be served concurrent to that time imposed in base term as to Count XI.

"All monetary fines imposed are cumulative.

"*As to Counts I, III, V and VII: Each 4390 B&P*: Fine of $10,000.00, each count.

"*As to Counts II and IX: Each 2052 B&P*: County Jail, 6 months and fine of $1,000.00, each count.

"*As to Count IV: 4227 B&P*: County Jail, 6 months and fine of $1,000.00.

"*As to Counts VI and X: Each 11153(a) H&S*: State Prison, low term 16 months and fine of $20,000.00, each count.

"*As to Count VIII: 11352 H&S*: Fine of $20,000.00.

"*As to Counts XI, XII, XIII, XIV and XV: Each 14107 WIC*: State Prison, low term 16 months and fine of $5,000.00, each count.

"*As to Count XVI: 487.1 PC*: State Prison, low term 16 months and fine of $10,000.00.

"*As to Count XVII: 182.4 PC*: State Prison, low term, 16 months and fine of $10,000.00.

"Total amount of fines imposed is $148,000.00, plus penalty assessment of

> $199,800.00, for a final total of $347,800. Said amount ordered payable thru the L.A. County Treasurer-Tax Collector, and is due forthwith." CT 1066.

As for petitioner Rita Gandotra, proceedings were suspended and she was placed on five years probation upon the conditions, inter alia, that she spend 180 days in county jail, pay a fine of $10,000.00 plus a 135 percent penalty assessment, and pay restitution in an amount to be fixed by civil litigation. CT 1068.

Petitioners' notice of appeal was timely filed on May 30, 1990. CT 1073. Bail on appeal was granted as to petitioner Rita Gandotra. CT 1069. However, petitioner Suresh Gandotra's application for bail pending appeal was denied, CT 1069, as were his subsequent petitions seeking review of that ruling. Dr. Gandotra has since served his 16-month prison sentence and has been released on parole.

Petitioners' judgment of conviction was affirmed as modified by the California Court of Appeal, Second Appellate District, Division One, in a partially published opinion reported at *People v. Gandotra*, 11 Cal.App.4th 1355, 14 Cal.Rptr.2d 896, filed on December 23, 1992. A2-A53. In its decision the Court of Appeal expressly rejected petitioners' claim founded on the Eighth Amendment's Excessive Fines Clause that the unstayed aggregate fines ($101,000) and penalty assessments ($136,350), a total of $237,350 imposed as to Dr. Gandotra – the maximum possible fine under state law for his offenses[1] – was

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[1] In its original decision on appeal, filed August 26, 1992, the Court of Appeal upheld the total fine of $347,800 imposed by the trial court, *ante* at 4-5, but rehearing subsequently was

unconstitutionally excessive. A46-A51. The California Supreme Court denied their petition seeking review of that issue (and others). A1.

B. Summary of Underlying Facts

The facts, as pertinent to the issues presented in this petition, are relatively simple and without dispute. See gen. A4-A5.

As early as October 15, 1987, the State Department of Health's Medi-Cal Program had become suspicious of unusual billing practices occurring at Coast Urgent Care Medical Clinic. Reporter's Transcript 234-238 ("RT"). In her role as "a medical consultant with [the] California Department of Health Services," Dr. Judith Paule conducted an audit and review of Coast. RT 234-238. When Dr. Paule first spoke with Dr. Gandotra, she asked him "if he used physician's assistants in his clinic." RT 240. He replied "that he had physician's assistants in his clinic," and named "Thomas Sevilla, Carlo (sic) Cuellar, and Winston Saunders." RT 241. At the same time, Dr. Gandotra was asked if he had medical assistants or medical aids; he replied, " 'No.' " RT 241-242. Dr. Gandotra also stated that there were no other licensed doctors working at the clinic at that time. RT 243. Dr. Paule's subsequent review of the clinic's patient files revealed that "approximately 42 percent of all the services that we reviewed

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granted, see A3, n. 1; the appellate court's superseding opinion concluded that some of the fines violated the statutory prohibition against multiple punishments, Cal. Pen. Code § 654, and modified the judgment by deleting the erroneously imposed fines, resulting in "a new grand total of $237,350." A46; see also A3, A37-A46, A53.

were not documented in the records." RT 247. In addition, many different handwriting styles appeared in the patient charts. RT 249.

After reviewing the patient files, Dr. Paule had a second conversation with Dr. Gandotra. RT 251. She asked him if "the individuals that he had indicated as writing the notes in the chart were physician's assistants, and, if so, I needed their – I needed to see their licenses." RT 252. Dr. Gandotra responded that "the individuals were not physician's assistants, they were medical assistants." RT 252. He told her that "he reviews the record and checks the patient after the person who wrote the record saw the patient." RT 256.

Dr. Paule never completed her audit and review of the clinic. RT 276. Instead, based on her "suspicions of fraudulent activity," RT 293, she "referred the case to our investigations unit, and to the Bureau of Medi-Cal Fraud, and to the Bureau of Medical Quality Assurance, or B.M.Q.A. . . . " RT 292. Dr. Paule told the investigation unit "that there was a provider who was using unlicensed personnel to treat patients. . . . " RT 304. Kathy Rodriguez, an investigator in the California Attorney General's Bureau of Medi-Cal Fraud and Patient Abuse, was assigned to the case in October, 1987, RT 162-163, after "[a] complaint was received from the Department of Heath Services Surveillance and Utilization Review" containing "an allegation that services were being provided by individuals who were not licensed physicians to Medi-Cal recipients." RT 165.

On February 27, 1988 and March 4, 1988, undercover investigations were conducted at Coast. Three state agents were involved in the February operation (investigators Lou Fuentes, Joe Villalba, and Gilbert Lovio), four

(Harry Blair, Nancy McSween, Richard Maxfield, and Susan Milne) in the March investigation. RT 171-172, 175-176. Carlos Cuellar, a foreign medical graduate who was not licensed to practice medicine in California, provided medical treatment and wrote prescriptions on the first occasion; Richardo Santos, also an unlicensed graduate from a foreign medical school, did so on the second. The agents provided Investigator Rodriguez with prescriptions and medications they acquired, respectively, from Cuellar and Santos, and the Medi-Cal cards they had used in seeking treatment at the clinic. RT 172, 176.

These seven undercover operations, performed on two successive weekends – with state agents literally stacked up in the waiting room of the clinic awaiting treatment – spawned 12 of the 17 counts charged in the information. See CT 864-876. While the original scope of the investigation was to determine whether or not unlicensed personnel employed by Coast were practicing medicine and thereby fraudulently billing Medi-Cal for services, RT 165, 234-238, the charges quickly mushroomed into felony violations of the California Business & Professions Code and Health & Safety Code as a result of the operations's methodology – i.e., the undercover agents all described generalized ailments and low-grade pain, knowing their complaints were likely to result in medical examination and treatment; if drugs were not furnished or prescribed to combat the symptoms from which they claimed to be suffering, the ersatz patients did not hesitate to ask. See e.g., RT 967-970, 994-995.

The remaining charges pertained to Dr. Gandotra's presenting Medi-Cal claims for the medical services provided by his assistants and, in some instances, for

patients who were not treated; some of the false claims were processed by Mrs. Gandotra. A4, A29-A30.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

CERTIORARI IS NECESSARY TO DETERMINE WHETHER THE CALIFORNIA COURT OF APPEAL PROPERLY FOUND NO VIOLATION OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IN THE IMPOSITION OF MULTIPLE STATUTORY FINES AND PENALTY ASSESSMENTS THAT TOTALED $237,350, THE MAXIMUM POSSIBLE UNDER CALIFORNIA LAW FOR PETITIONERS' OFFENSES, ON THE GROUNDS THAT THIS AGGREGATE FINE DID NOT "SHOCK PUBLIC SENTIMENT AND VIOLATE THE JUDGMENT OF REASONABLE PEOPLE ABOUT WHAT IS RIGHT AND PROPER" AND "THE PUNISHMENT THUS IMPOSED IS NOT THE FAULT OF THE LAW BUT OF THE ONE WHO VIOLATES IT," WITHOUT CONSIDERATION OF WHETHER THAT FINE WAS EXCESSIVE IN RELATION TO THE NATURE OF THE CRIMES AND PETITIONERS' CULPABILITY, THE EXTENT OF THEIR CRIMINAL GAIN, AND THEIR ABILITY TO PAY THAT AMOUNT — FACTORS DEEMED RELEVANT BY ALL OTHER FEDERAL AND STATE COURTS THAT HAVE ADDRESSED THIS ISSUE

Petitioners unsuccessfully challenged on appeal that portion of the judgment imposing maximum fines and penalty assessments on Dr. Suresh Gandotra that, even after modification by the state appellate court, cumulated $237,350 (plus an additional $23,500, imposed on Rita Gandotra as a condition of probation). That total fine, they have maintained, violated the provision of the Eighth Amendment, applicable to the states through the

Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660 (1962); *Furman v. Georgia*, 408 U.S. 238 (1972), which states: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted." (Emphasis added.)

The California Court of Appeal, acknowledging "a dearth of authority on the [E]xcessive [F]ines [C]lause," A47, followed the test of another California appellate court decided in the prohibition era, and drawn from the treatise Corpus Juris, which essentially renders any fine immune from constitutional scrutiny whenever the resulting punishment is "the fault" of the one who violates the law. A47-A48, quoting *People v. Magoni*, 73 Cal.App. 78, 80-81, 238 P. 112, 113 (1925). Although claims that a fine is unconstitutionally excessive have been addressed with some frequency in more recent state and lower federal court decisions, see, e.g., cases cited at 15-16, *post*, none has adopted a similar approach; of course, this Court has never reached the merits of such a claim nor have its decisions considered the proper test(s) or standard to be applied in cases which present that question.

Indeed, until recently the Excessive Fines Clause had barely even achieved mention in this Court's decisions, and on the first occasion that it received extended consideration five Terms ago, the context was not a criminal case at all. Thus in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court concluded that the Eighth Amendment's prohibition against excessive fines is inapplicable to punitive damage awards between private parties in a civil case. *Id.* at 259-260, 280.

Justice Blackmun, writing for the majority in *Browning-Ferris*, observed that "[a]lthough this Court has never considered an application of the Excessive Fines Clause," 492 U.S. at 262, its jurisprudence had long understood the Excessive Fines Clause to be directed at the criminal process and addressed to the jurisdiction of criminal courts. *Id.* at 262-263. Tracing its historical roots, he explained:

> "The undisputed purpose and history of the Amendment generally, and of the Excessive Fines Clause specifically, confirms our reading. The Eighth Amendment was clearly adopted with the particular intent of placing limits on the powers of the new Government. 'At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights.' * * * Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages." 492 U.S. at 266.

The language of the Eighth Amendment was derived from the English Bill of Rights. *Solem v. Helms*, 463 U.S. 277, 285, n. 10 (1983). As Justice Blackmun recounted in *Browning-Ferris*:

> " 'The English version, adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II.' During the reigns of the Stuarts the King's judges had imposed heavy fines on the King's enemies, much as the Star Chamber had done before its abolition in 1641. L. Schwoerer,

> The Declaration of Rights, 1689, p. 91 (1981). In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed. *Ibid.* The group which drew up the 1689 Bill of Rights had first-hand experience; several had been subjected to heavy fines by the King's bench. *Id.* at 91-92, and n. 198." 492 U.S. at 267 (fn. omitted).

In fact, the history of the Excessive Fines Clause can be traced all the way back to the Magna Carta and the barons who "sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown." *Browning-Ferris*, at 270-271.

Justice Scalia's lead opinion in *Harmelin v. Michigan*, 501 U.S. ___, 115 L.Ed.2d 836 (1991) (joined by Chief Justice Rehnquist) emphasized the unique reasons why heightened scrutiny attends the Excessive Fines Clause:

> "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. See *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977); *Perry v. United States*, 294 U.S. 330, 350-351, 79 L.Ed. 912, 55 S.Ct. 432, 95 A.L.R. 1335 (1935). (We relied upon precisely the lack

> of this incentive for abuse in holding that 'punitive damages' were not 'fines' within the meaning of the Eighth Amendment. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271-276, 106 L.Ed.2d 219, 109 S.Ct. 2909 (1989)). Thus, some early State Constitutions prohibited excessive fines without placing any restrictions on other modes of punishment." *Harmelin*, 115 L.Ed.2d at 854-855, n. 9.

Just this past Term, the Court considered whether the Excessive Fines Clause was applicable in the context of two different statutes that exacted, respectively, in rem and in personam forfeitures; it held that both are subject to the Eighth Amendment's prohibition against imposition of excessive fines. *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 61 U.S.L.W. 4811 (1993); *Alexander v. United States*, 509 U.S. ___, 125 L.Ed.2d 441, 61 U.S.L.W. 4796 (1993). Here, as in *Alexander*, there is no threshold question concerning application of the Eighth Amendment because this case involves multiple fines imposed by the state in a criminal prosecution. 509 U.S. at ___, n. 4, 61 U.S.L.W. at 4800, n. 4. However, in both *Austin* and *Alexander*, the cases were remanded to the lower court to resolve what standards and factors are relevant to determining whether a forfeiture is unconstitutionally excessive within the meaning of the Eighth Amendment. *Austin*, at ___, 61 U.S.L.W. at 4816 ("Court of Appeals . . . had no occasion to consider what factors should inform such a decision. . . . Prudence dictates that we allow the lower courts to consider that question in the first instance."); *Alexander*, at ___, 61 U.S.L.W. at 4800 ("We think it preferable that this question be addressed by the Court of Appeals in the first instance"). Thus, it may fairly be said that this Court has yet to inform the

states and lower federal courts on the applicable standard and factors; nevertheless, some hints can be gleaned from recent statements in its opinions.

For example, Justice Scalia's concurring opinion in *Austin v. United States* took note of the historical basis for measuring a fine's excessiveness in accordance with the offense perpetrated:

> "I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures. In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the king's opponents, see *Browning-Ferris*, 492 U.S., at 266-267, demonstrate that the touchstone is value of the fine in relation to the offense. And in *Alexander v. United States*, we indicated that the same is true for *in personam* forfeiture. ___ U.S., at ___ (slip op., at 14)." *Austin*, at ___, 61 U.S.L.W. at 4818 (Scalia, J., conc. opn.).

And, in *Alexander v. United States*, the Chief Justice, speaking for the majority, endorsed consideration of the defendant's overall criminal conduct as a proper factor in determining whether a forfeiture order in a RICO case was "excessive". 509 U.S. at ___, 61 U.S.L.W. at 4800. The Court expressly rejected that Court of Appeals' reliance on cases holding that the Cruel and Unusual Punishments Clause does not require proportionality review of a sentence less than life imprisonment without parole, because rather than being "concerned with matters such as the duration or conditions of confinement, '[t]he Excessive Fines Clause limits the Government's power to

extract payments, whether in cash or in kind, as punishment for some offense.' " *Alexander* at ___, 61 U.S.L.W. at 4799 (quoting *Austin* at ___, 61 U.S.L.W. at 4813).

Unlike the Eighth Circuit in Austin and Alexander, the Third Circuit Court of Appeals has taken an expansive view as to the role of proportionality analysis in examining whether a fine is unconstitutionally excessive:

> "We note that a district court's proportionality analysis, while it will not in every case be extensive or encompass the three factors set forth in *Solem*[2], must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. See e.g., *United States v. Busher*, 817 F.2d at 1415 (where dollar amount of fraudulent conduct constituted a small fraction of the legitimate business of the enterprise, the court found a potential *prima facie* showing of excessive forfeiture). The language of the eighth amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime." *United States v. Sarbello*, 985 F.2d 716, 724 (CA 3 1993).

A number of other lower state and federal courts have considered the application of the Excessive Fines

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[2] *Solem v. Helm*, 463 U.S. 277 (1983)

Clause of the Eighth Amendment and/or comparable provisions of their own state constitutions. From these decisions several separate and distinct formulations have emerged for determining whether or not a fine is excessive in the constitutional sense: First, a fine may be found excessive if it is out of proportion to the offense and offender. *People v. Djekich*, 229 Cal.App.3d 1213, 1224, n. 12, 280 Cal.Rptr. 824, 830, n. 12 (1991); see also *In re Lynch*, 8 Cal.3d 410, 105 Cal.Rptr. 217 (1972); *State v. Scherer*, 11 Kan.App.2d 362, 721 P.2d 743, 750 (1986); *United States v. Sarbello*, 985 F.2d at 724. Second, a fine may be found excessive if it is out of proportion to the defendant's ability to pay and works to deprive him of his liberty and/or property. *People v. Saffore*, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972, 975 (1966); *People v. Ingham*, 115 Misc.2d 64, 453 N.Y.S.2d 325, 328 (1982); cf. *In re Antazo*, 3 Cal.3d 100, 89 Cal.Rptr. 255 (1970). Third, a fine may be found excessive when it is greater than the gains netted from the criminal endeavor. *United States v. Elkins*, 885 F.2d 775, 789 (CA 11 1989); see also *Sarbello*, 985 F.2d at 724. Finally, a fine may be found excessive if the charges are stacked "simply to aggrandize the penalty to make one economically impotent without benefit of bankruptcy." *State v. Starlight Club*, 17 Utah 2d 174, 406 P.2d 912, 915 (1965). These factors, while overlapping in some situations, have been treated as *independent* of one another; each provides a different basis upon which to find a particular fine excessive, and the presence of *any* may suffice.

Acknowledging a "dearth of authority on the excessive fines clause," A47, and mindful of this Court's own recognition in 1989, *Browning-Ferris*, 492 U.S. 257, 262,

that it had "never considered an application of the Excessive Fines Clause," the California Court of Appeal turned first to the single California case that has applied the state Constitution's counterpart provision to a fine, a 1925 decision. In that case, the Court of Appeal, quoting from 16 Corpus Juris at 1358, declared: " ' "In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ' " A47, quoting *People v. Magoni*, 73 Cal.App. 78, 80-81, 238 P. 112, 113.

Although some aspects of this quaint formulation may well be questioned – most particularly, in light of the more recent formulations cited immediately above, *Magoni*'s evident requirement that an "excessive and unusual" fine *also* be "so disproportionate, etc.", and its curious use of a "reasonable person" standard – its illegitimacy becomes most focused when the rule is stated in the very next sentence of *Magoni*, again reiterated in the present opinion:

> " ' "A statute does not violate the constitutional provision prohibiting excessive fines or the imposition of cruel and unusual punishments, because it authorizes a fine to be imposed for each sale of liquor without a license, for each act of extortion in charging excessive freight rates, for each animal one unlawfully may have in his possession, or for each day the statute is violated, or because it makes the deposit of each letter in a scheme to defraud a separate offense, even though the fine in the aggregate amounts to a large sum, since the punishment thus

> imposed is not the fault of the law but of the one who violates it." ' "

A47-A48, quoting *People v. Magoni*, 73 Cal.App. at 81, 238 P. at 113. The State Court of Appeal in petitioners' case finds the *Magoni* quotation "instructive", and repeats it in holding that petitioners' aggregate fines were not unconstitutionally excessive, " ' "since the punishment thus imposed is not the *fault* of the law but *of the one who violates it*." ' " A48, quoting *Magoni, supra* (emphasis added).[3]

The Court of Appeal's "fault" analysis, however, simply begs the question of whether the fines imposed are excessive: all convicted criminals, by definition, have brought their punishment on themselves, but that does not mean "the law" albeit faultless cannot be at "fault" in a constitutional sense. Under this test, moreover, the greater the fine, presumably the greater the offender's fault, hence the *less* cause she has to question it.

So too the fact that petitioners do not merely "challenge . . . *a single* punishment prescribed by the Legislature," A49 (emphasis added), does not defeat their Eighth

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[3] The court's opinion then proceeds to distinguish *In re Lynch*, 8 Cal.3d 410, 420-424, 105 Cal.Rptr. 217, 223-226, which held a term of one year to life imprisonment for second-offense indecent exposure violated the prohibition against cruel *or* unusual punishment under the *California* Constitution, because "[t]his case, unlike *Lynch*, does not involve a challenge to a single punishment prescribed by the Legislature, A48-A49, and *People v. Djekich*, 229 Cal.App.3d 1213, 280 Cal.Rptr. 824, "which, as defendants acknowledge, did not address the excessive fines clause because the defendant did not raise the issue." A49. Both cases plainly have no effect on the *Magoni* formulation; that 1925 case remains the last definitive word on "excessive" fines in California.

Amendment claim. Even the cases cited but distinguished by the decision below suggest that it is often the aggregation of fines based on multiple offenses which triggers review under the Excessive Fines Clause. See *People v. Magoni*, 73 Cal.App. at 79-80, 238 P. at 113 (defendant convicted and fined for each of two instances of unlawful sale of alcohol); *State v. Starlight Club*, 406 P.2d at 913 (defendant convicted and fined for three counts of unlawful selling of alcohol).

In relation to the present case, *State v. Starlight Club*, 406 P.2d 912 is especially apposite because the California Court of Appeal chose to highlight and distinguish that case, and also because that state's comparable manner of investigation and instituting charges led directly to the Utah Supreme Court's determination that the fines imposed were unconstitutionally excessive.

> The facts in the *Starlight Club* case were these:
>
> " . . . A police officer's wife gained the confidence of a waitress who was induced to sell her a drink. Each sale, of course, would be a technical violation of the statute. This continued for three consecutive Friday nights, commencing January 31, 1964, during which time the police officer joined his wife and bought a number of drinks about 10 or 12 in all, each of which could have been the subject of a $2,500 fine – or an aggregate of $25,000. Had the officer and his wife returned week after week after week, the aggregate fine could have become staggering. The complaints were not filed until December 23, 1964, which seems significant." 406 P.2d at 914.

Ultimately, the defendant was charged with and convicted of three counts of unlawfully selling alcohol; its

nonprofit corporate charter was revoked and the maximum $2,500 fine was imposed on each count, for a total of $7,500 in fines. *Id.* at 913.

The Utah Supreme Court found the $7,500 in fines unconstitutionally excessive because, as Chief Justice Henriod explained,

> "We feel that the gathering of this evidence, in this particular case, was really *one episode* designed to terminate defendant's charter, remove what someone thought to have been a loose operation in violation of the statute, and that really but one mission, *not three*, was accomplished. In this case the continuing violation was nurtured, not reported to a magistrate or stopped, for two or three weeks, nor for 10 more months. Under the particular facts of this case, we think that revocation of the charter, (three times, if you please, two of which obviously were impossible) plus a maximum $2,500 fine satisfied the ends of justice, and that two more maximum sentences which had to do really with but one investigation and prosecution, offended against the excessive fine interdiction of the Constitution. We say this in face of the authorities cited by respondent.
>
> "We are not about to say that one may be fined only once but we are prepared to say that where it is obvious, as is the case here, that one purchase of liquor, where the maximum penalty is a forfeiture of the charter, plus a maximum fine of $2,500, is sufficient and does not justify continued charges and convictions based on continued encouragement to commit crime, under the same circumstances, for an extended period, by the same persons, *simply to aggrandize the penalty* to make one economically impotent without the benefit of bankruptcy. That's why

> we say that in our opinion, under the circumstances *of this particular case* the constitutional prohibition against excessive fines means something." *State v. Starlight Club*, 406 P.2d at 914-915 (emphasis in original; footnote omitted).

The repeated investigations and stacking of offenses which implicated the Excessive Fines Clause in *Starlight Club* are paralleled in the present case.[4] By design, those operations here encouraged additional offenses no less

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[4] The Court of Appeal questioned the *Starlight Club* case's applicability because "[i]t is not clear whether the Utah court would have reached the same result had the investigation been conducted by different undercover agents who discovered several types of statutory violations." A50. Petitioners fail to perceive the difference between repeated undercover investigations by a *single* team of agents versus repeated investigations by *several* teams of agents. The result to the defendants is the same: the *stacking* of charges complied by a single investigative branch of the government. Neither can petitioners distinguish between the stacking of a single violation of law, as was the case in *Starlight Club*, and the stacking of several violations of law arising out of numerous undercover investigations. Once again, in each instance the *same* arm of the government is involved in *one* "mission," *State v. Starlight Club*, 406 P.2d 912, 914, i.e., to detect suspected unlawful conduct.

If petitioners understand the Court of Appeal's decision correctly, it *would* have made a difference in this case if the state had sent the same team of investigators to the clinic to receive repeated treatment for a chronic complaint. Thus, while the end result is the same – stacked charges against the defendant – the remedy is controlled by the *manner* in which the state decides to conduct its investigation. That is illogical because it gives the state a green light to accomplish the very evil criticized by the Utah Supreme Court – " . . . aggrandiz[ing] the penalty to make one economically impotent without the benefit of bankruptcy." *State v. Starlight Club*, 406 P.2d at 915. Of course, this was the very evil which the *Starlight Club* court concluded invoked the excessive fines clause. *Ibid.*

than in that case, so it may be said in this instance as well that the state's actions "aggrandize[d] the penalty," 406 P.2d at 915, by stacking the charges.[5] But, as suggested by the Third Circuit, "[o]ther helpful inquiries," *United States v. Sarbello*, 985 F.2d at 724, also point to the fine's excessiveness in this case, including "assessments of the personal benefit reaped by the defendant, the defendant's motive and culpability, and of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct." *Ibid.*

Thus, in connection with Dr. Gandotra's aiding and abetting in the unlawful practice of medicine (Counts II & IX), it is not insignificant that the evidence justified charging him only with misdemeanor violations of California Business and Professions Code section 2052 rather than the more serious felony committed when the unlicensed practice of medicine creates a risk of great bodily harm. See Cal. Bus. & Profs. Code § 2053; *People v. Burroughs*, 234 Cal.App.3d 245, 285 Cal.Rptr. 622 (1991). It must also be borne in mind that although Carlos Cuellar and Ricardo Santos could not practice medicine lawfully in California, both men nonetheless were medical school

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[5] This is especially so in light of the fact that the prosecution never claimed that Dr. Gandotra was running a prescription mill or otherwise aiding in the illicit drug business, for which the pursuit of multiple missions – hence multiple punishment therefor – would be unobjectionable. Lest there be any misunderstanding, petitioners' reliance on the prohibition against excessive fines would not limit the state's ability to conduct criminal investigations and prosecute multiple violations of law to conviction; their point, rather, is that – in constitutional terms – repeated investigations of the narrow kind and in the context of the continuing episode involved here, did not justify substantially upping the ante when the time came for sentencing.

graduates and licensed medical doctors in their home countries; both had far more training, experience, and expertise than required of those licensed in California as medical assistants or physician's assistants. RT 317, 531, 697. Indeed, by the time of trial, they were preparing to take their California medical examinations. RT 314, 466. In fact, Cesar Aranguri, who worked at Coast from mid-1984 until mid-1986, had obtained his California medical license in 1988. RT 928. Thus Dr. Gandotra's culpability as an aider and abettor in the treatment of Coast's patients by Cuellar and Santos does not undercut, for *sentencing purposes*, the further evidence – never disputed by the People – that the care they provided was competent, professional and evidently beneficial.

Dr. Gandotra's convictions of aiding and abetting eight drug and/or prescription offenses likewise must be viewed in context. Most involved a common, analgesic – Ibuprofen – which in slightly smaller dosages is readily available over the counter. CT 864-866 (Counts I, III, & IV). Three counts involved a slightly stronger analgesic – Tylenol with Codeine #3 and Fiorinal with Codeine #3. CT 867-869 (Counts VII, VIII, & X). The remaining two counts involved the common tranquilizer Valium, or as it is otherwise known, Diazepam. CT 866-867 (Counts V & VI). No less significant than the widespread usage of these common drugs is the fact that *in this case*, such drugs were prescribed for legitimate medical purposes in a clinical setting and in amounts that were reasonable for the treatment of ailments complained of by the undercover agents qua patients. This plainly was *not* a case of a medical doctor, clinic, or pharmacy assisting in the illicit drug trade by operating a prescription mill or supplying narcotics to known addicts. Cf. *United States v. Moore*, 423

U.S. 122 (1975); *People v. Doss*, 4 Cal.App.4th 1585, 6 Cal.Rptr. 590 (1992); *People v. Anderson*, 29 Cal.App.3d 551, 105 Cal.Rptr. 664 (1972). The maximum fines imposed by the court for *all* of these offenses, each consecutive to one another, were proportionate *neither* to these crimes nor their perpetrator's culpability.

The remaining offenses, involving theft and fraud-related violations, CT 869-876 (Counts XI-XVII), were for the most part directly related to the hiring and use of foreign medical graduates and the clinic's ineligibility to bill for services under Medi-Cal guidelines. Theft from the public fisc is a serious matter, but punishment must still be commensurate with the defendant's transgression and resulting unlawful gain. Despite the prosecution's insinuation below that petitioners received hundreds of thousands of dollars from Medi-Cal over the years, the proof reflected far more modest figures: $1,069.72 fraudulently obtained through claims that were charged in connection with Counts XI through XV, RT 1799-1800, and approximately $8,700.00 obtained in connection with the grand theft in Count XVI. RT 1801.[6] The People's unproven suggestions of exorbitant gain notwithstanding, the maximum fines for those offenses bore no reasonable relationship to petitioners' culpability.

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[6] It appears that the $722,000 figure mentioned by Investigator Rodriguez included all of the income derived by Coast over a three-year period. RT 1800-1801. Despite her speculation that that greater amount constituted sums *fraudulently* obtained from Medi-Cal, there was *absolutely no evidence presented to substantiate that claim*. In fact, from the testimony of Robert Pierson, it appears that the amounts referred to by Ms. Rodriguez included *all* of the monies paid to Coast over that period of time with no differentiation between legitimate and fraudulently obtained sums. See RT 68-69.

The disproportionality of the punishment in this case particularly implicates Justice Scalia's concern "that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin v. Michigan*, 501 U.S. at ___, 115 L.Ed.2d at 854, n. 9 (conc. opn.). It is also disproportionate because the amount of the fine vastly exceeds the criminal taint on petitioner's legitimate income from the clinic as proven at trial. Cf. *Austin v. United States*, 509 U.S. at ___, 125 L.Ed.2d at ___, 61 U.S.L.W. at 4818 (Scalia, J., conc. opn.); *United States v. Sarbello*, 985 F.2d at 724. Neither of these concerns was reflected in the trial court's pronouncement (without explanation or statement of reasons) of the maximum possible fine to which Dr. Gandotra was exposed;[7] instead the court simply "threw the book" at petitioner, raising the strong suspicion under the circumstances that the dollar total was aimed more at the enhancement of ever-needy governmental coffers than the proper measure of retribution and deterrence.

As is clear from review of the record, and has never been questioned by either the prosecution or the state courts, the cumulative $237,350 that Dr. and Mrs. Gandotra must pay on his total fines and penalty assessments (increased an additional $23,500 for her fine and

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[7] As noted earlier, the Court of Appeal recognized that the total fine had to be reduced from $347,800 to $237,350 because the trial court violated Cal. Pen. Code § 654 by imposing multiple fines for offenses arising out of the same act or course of conduct. A46. The fact remains, even after the required modification, that the judge who sentenced petitioners intended to fine Dr. Gandotra the maximum he believed was allowed by law, and that the reduction notwithstanding, the "new grand total" still is the *maximum* any court could have imposed for these offenses.

penalty assessment) vastly exceeds their ability to pay without being deprived of nearly all of their worldly possessions. The initial probation reports erroneously represented the Gandotras' income as $90,000 a *month*. CT 1083, 1099. This figure was disputed by defense counsel; supplemental probation reports indicated that the correct figure was $90,000 a *year*. CT 1089, 1106. The supplemental report did not attempt to resolve this glaring discrepancy. CT 1090, 1107. The probation officer noted, however, that monthly income "could change drastically with any period of incarceration," and assured the court that the situation would be monitored: "Should the defendant be placed on probation with a financial order this area would be covered in more depth to set up an appropriate monthly payment schedule for the defendant to meet." CT 1090; see also CT 1107. Although defense counsel again raised this discrepancy at the time of sentencing, and offered petitioners' federal tax returns for the previous year to prove the inaccuracy of the $90,000-per-month version, RT 2166, the trial judge never explicitly resolved the conflict. See RT 2170-2190.[8]

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[8] The Court of Appeal summarily dismissed this concern in rejecting petitioner's alternate reliance on the Fourteenth Amendment's Due Process Clause:

> "The defendants raised the issue of the conflicting evidence on income at the sentencing hearing, and the trial court fairly ruled against them. This was not a case of unlimited or arbitrary judicial discretion. Under these facts, we believe the defendants were amply protected by provisions of section 654 and that any responsibility for the imposition of multiple fines rests with defendants rather than the prosecution, judiciary, or Legislature." A53.

As Justice O'Connor recently admonished, however, " . . . due process does not simply require that a particular result

Neither, as is evident from the record, did the trial court address the amount of the fine in relation to the petitioners' net worth. The probation reports estimated that the Gandotras' total assets were $925,000 and their total liabilities were $525,000. CT 1083, 1099. Defense counsel maintained that incarceration would "result in a loss of all community assets." RT 2166. Even absent that consideration, the information before the court showed that the aggregate fines pronounced in the original sentence (before their modification on appeal) represented petitioners' *entire net worth*. CT 1099 ($925,000 in assets minus $525,000 in liabilities equals $400,000 in net worth). And the judge ordered the fines paid "forthwith." RT 2177; CT 1066. Clearly a fine which strips a person or family, as here, of nearly all of their personal possessions is excessive by any measure of the term.[9] Although the

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be substantively acceptable; it also requires that it be reached on the basis of permissible considerations." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. ___, ___, 125 L.Ed.2d 366, ___, 61 U.S.L.W. 4766, 4778 (1993) (O'Connor, J., dis.). In the absence of any credible evidence that petitioners earned $90,000 a month, rather than $90,000 a year, it cannot be enough to dispose of the conflict that the sentencing judge "fairly ruled" albeit *erroneously*. Even the narrow review acceptable to Justices Scalia and Thomas in *TXO*, as to punitive damages, would not be satisfied by the Court of Appeal's "fair" ruling approach: "Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury awarded compensatory damages (including damages for pain and suffering). . . . " *TXO Production Corp.*, at ___, 61 U.S.L.W. at 4773 (Scalia, J., conc. opn.).

[9] To be sure, financial ruin is financial ruin. But if Justice Scalia's concerns about the potential that fines can become disproportionate to legitimate goals of punishment, *Harmelin*, 501

Court of Appeal's reduction of the fine to the lawful statutory limit affords petitioners modest relief, to this day no California court has considered whether the amount that must be paid – before or after its correction – is commensurate with petitioners' ability to pay it.

Petitioners also argued that the fines in this case were out of proportion to their ability to pay and worked to deprive them improperly of their liberty and/or property. See *People v. Saffore*, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 975; *People v. Ingham*, 115 Misc.2d 64, 453 N.Y.S.2d 325, 328; cf. *In re Antazo*, 3 Cal.3d 100, 89 Cal.Rptr. 255. In rejecting this analysis, the Court of Appeal explained: (1) " . . . we have reduced the total fines and assessments [per Cal. Pen. Code § 654] from $347,800 to $237,350;" (2) " . . . the defendants are not challenging any single statute on the ground that its lack of such evidentiary requirement renders the statute invalid;" and (3) " . . . defendants are not claiming that they will be precluded from introducing evidence of hardship or inability to pay at some later hearing, such as a probation violation hearing." A50-A51. None of these reasons is sound.

First, under proper application of this test, the court must examine the defendants' ability to pay the fine as measured against their *net* worth. In short, the fine

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U.S. at ___, 115 L.Ed.2d at 854, are accurate, the consequences of stripping a defendant of all of his or her resources is even more insidious in the criminal law context when, as with Dr. Gandotra, the defendant is ordered immediately *imprisoned* at the time of sentencing and denied release pending bail. While the civil defendant may be able to immediately begin the arduous task of rebuilding his or her world, the criminal defendant ordered punished without delay – and the family he leaves behind to fend on their own – must await his or her release from prison.

imposed must not financially ruin petitioners. *Saffore*, 271 N.Y.S.2d at 975; *Ingham*, 453 N.Y.S.2d at 328. Here, notwithstanding the discrepancy between petitioners' purported annual income and that shown by their tax returns, the probation report reflects that the fines and penalty assessments originally imposed nearly equalled the Gandotras' entire net worth. CT 1083, 1089. Even after allowing for the reductions required by Cal. Penal Code § 654, A37-A46, the remaining total approximates *sixty-five percent of their entire net worth.* CT 1083, 1089. *This* is clearly excessive.

Second, proof of a defendant's ability to pay a fine in the present context is a function of constitutional concerns, not a matter of statutorily allocating the burden of proof. *Saffore*, 271 N.Y.S.2d at 975; *Ingham*, 453 N.Y.S.2d at 328, and, under the circumstances, it is the *cumulative amount* of the fines – rather than any single statutory maximum – which is to be measured against the constitutional bar to excessive fines. *Starlight Club*, 406 P.2d at 914-915. Finally, awaiting "some later hearing, such as a probation violation hearing," A51, wastes judicial resources, places the defendants at unnecessary risk of later incarceration, and leaves them open to the subsequent argument that the issue has been waived. Cf. *People v. Walker*, 54 Cal.3d 1013, 1022-1023, 1 Cal.Rptr.2d 902, 907-908 (1991) If petitioners' aggregate fines and penalty assessments offend the Excessive Fines Clause, no later procedure that theoretically may be available to temper the severe effects which subsequently result from nonpayment makes these fines *less excessive* in any constitutionally recognized sense.

In sum, the standard in California for determination of a claim that the fine imposed is excessive under the

Eighth Amendment as applied by the State Court of Appeal in the present case, based solely upon the 1925 formulation of *People v. Magoni, supra,* was of doubtful constitutionality then, and surely cannot be harmonized today with the more recent treatment of that question by those courts that have addressed it. Rather than being concerned with whether the fine was excessive in relation to the nature of petitioners' offenses and level of culpability, the extent of gain from their criminal activity, and their financial ability to pay the amount imposed, the court below limited its review to an incongruous "reasonable person" standard and rejected petitioners' constitutional attack on the theory that it was the law-breaker instead of the law that was "at fault". The time has come for this Court to provide guidance and resolve which of the conflicting approaches taken by the lower courts is to govern this important issue.

CONCLUSION

Because the California Court of Appeal has failed to properly consider these fundamental questions, petitioners respectfully urge this Court to grant their petition for writ of certiorari and decide which test(s) and factors are applicable under the Excessive Fines Clause of the Eighth Amendment.

Respectfully submitted,

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Second Appellate District, Division One, No. B051942
S031015

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

SURESH GANDOTRA Et Al., Appellants

Appellants' petition for review DENIED.

(Filed April 21, 1993)

LUCAS
Chief Justice

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SURESH GANDOTRA, et al., Defendants and Appellants.	)	No. B051942 (Super. Ct. No. A 481115 c/w No. A 481141) (Filed Dec. 23, 1992)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Frisco, Judge. Modified and affirmed.

Dennis A. Fischer and Alan S. Yockelson for Defendants and Appellants.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Acting Assistant Attorney General, William T. Harter and Zaven V. Sinanian, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III through V.

Defendant Suresh Gandotra, M.D., operated a medical clinic in Los Angeles County. An undercover investigation by the Bureau of Medi-Cal Fraud and Patient Abuse of the California Department of Justice revealed Dr. Gandotra had falsely billed Medi-Cal for patients who either were not treated or were treated by unlicensed medical assistants in violation of Medi-Cal regulations and state licensing laws.

In the published portion of the opinion, we discuss Dr. Gandotra's convictions of aiding and abetting his unlicensed assistant in the prescribing and furnishing of controlled substances (Health & Saf. Code, §§ 11153, subd. (a), (counts 6, 10); 11352 subd. (a), (count 8)). Dr. Gandotra contends these counts must be reversed because there was no evidence at trial that the challenged prescriptions and medications were medically inappropriate treatments of the symptoms described by the undercover agents to the unlicensed assistant. Dr. Gandotra argues that, on this record, had he personally prescribed and furnished the medications, he could not have been charged under these statutes. We uphold the convictions on these counts.

In the unpublished portion of the opinion, we modify the judgment against Dr. Gandotra by striking some fines imposed in violation of Penal Code section 654. We affirm the judgments as modified.[1]

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[1] We filed our original opinion on this appeal on August 26, 1992. Thereafter, all parties requested that we publish the opinion, and the defendants petitioned for a rehearing. We granted the rehearing petition on September 10, 1992, modified our opinion without further argument, and partially granted the publication request.

BACKGROUND

It is undisputed that Dr. Gandotra hired three unlicensed medical assistants (Carlos Cuellar, Ricardo Santos, and Winston Saunders) to provide medical care to Medi-Cal patients at Dr. Gandotra's clinic. The assistants were not licensed in California to practice medicine or write prescriptions, and they were not authorized Medi-Cal providers.

Based on the medical services provided by the unlicensed assistants, Dr. Gandotra billed Medi-Cal under his own provider number for their unauthorized services. Substantial evidence established that Dr. Gandotra also presented Medi-Cal claims for services that were never rendered. Rita Gandotra, Dr. Gandotra's wife, processed some of the clinic's false Medi-Cal claims.

As a result of their fraudulent Medi-Cal billing, Dr. Gandotra and his wife were charged with and convicted of the following felonies: Medi-Cal fraud (Welf. & Inst. Code, § 14107 (counts 11-15)), grand theft (Pen. Code, § 487, subd. (1) (count 16)), and conspiracy to defraud (Pen. Code, § 182, subd. (a)(4) (count 17)). They do not challenge the sufficiency of the evidence to support their convictions on these counts.

During the investigation which led to this prosecution, five undercover agents posing as Medi-Cal patients received either forged controlled substance prescriptions (signed with Dr. Gandotra's name) or small quantities of controlled substances from Dr. Gandotra's unlicensed medical assistants. As a result of the medical treatments, prescriptions, and medications provided to the agents by the unlicensed assistants, Dr. Gandotra was charged with

and convicted of aiding and abetting the unlicensed assistants in: (1) practicing medicine without a license (Bus. & Prof. Code, § 2052 (counts 2, 9, misdemeanors)); (2) forging prescriptions (Bus. & Prof. Code, § 4390 (counts 1, 3, 5, 7, felonies)); and (3) distributing and prescribing controlled substances in violation of state law (Bus. & Prof. Code, §§ 4227 (count 4, a misdemeanor); Health & Saf. Code, § 11153, subd. (a) (counts 6, 10, felonies); Health & Saf. Code, § 11352 (count 8, a felony)).

ISSUES

Dr. Gandotra contends his convictions of aiding and abetting an unlicensed assistant to (I) prescribe (counts 6, 10) and (II) dispense (count 8) controlled substances must be reversed.

Both defendants contend: (III) the trial court abused its discretion by failing to discharge a juror who became unable to perform his duty during deliberations; (IV) counts 11 through 15 (Medi-Cal fraud) must be reversed due to instructional errors; and (V) the trial court erred in imposing fines against Dr. Gandotra.

DISCUSSION

I

We find the jury properly convicted Dr. Gandotra of aiding and abetting Ricardo Santos, an unlicensed medical assistant, in prescribing controlled substances to Agents Milne (count 6, Diazepam) and Blair (count 10, Fiorinal with codeine #3) in violation of Health and

Safety Code section 11153, subdivision (a).[2] We conclude there was sufficient evidence to support these verdicts and find no instructional error.

A. Count 6

Agent Milne, posing as patient Scott, went to the clinic and complained of sleeplessness and itching. Santos examined Milne and forged Dr. Gandotra's signature on a prescription for Diazepam, or Valium, a Schedule IV controlled substance (§ 11057, subd. (d)(7)). As a result of Santos' unlicensed treatment of Agent Milne, Dr. Gandotra was convicted of aiding and abetting Santos in (1) forging a prescription (Bus. & Prof. Code, § 4390, (count 5)), and (2) issuing an unlawful prescription for a controlled substance (§ 11153, (count 6)).

The trial court fined Dr. Gandotra $10,000 on count 5 and $20,000 on count 6. In the unpublished portion of the opinion, we stay the fine imposed on count 5 in violation of Penal Code section 654.

B. Count 10

Agent Blair went to the clinic posing as patient West and complained of a headache. Santos examined West and forged Dr. Gandotra's signature on a prescription for Fiorinal with codeine #3, a Schedule III controlled substance (§ 11056, subd. (e)). As a result of Santos' unlicensed treatment of Agent Blair, Dr. Gandotra was

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[2] Unless otherwise indicated, all statutory references in parts I and II are to the Health and Safety Code.

convicted of aiding and abetting Santos in unlawfully prescribing a controlled substance (§ 11153, subd. (a), (count 10)), and was fined $20,000.

C. Section 11153 Bars Unlicensed Assistants From Writing Controlled Substance Prescriptions

Section 11153, subdivision (a) states: "A prescription for a controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. Except as authorized by this division, the following are not legal prescriptions: (1) an order purporting to be a prescription which is issued not in the usual course of professional treatment or in legitimate and authorized research; or (2) an order for an addict or habitual user of controlled substances, which is issued not in the course of professional treatment or as part of an authorized methadone maintenance program, for the purpose of providing the user with controlled substances, sufficient to keep him or her comfortable by maintaining customary use."

Section 11153, subdivision (b) states: "Any person who knowingly violates this section shall be punished by imprisonment in the state prison or in the county jail not exceeding one year, or by a fine not exceeding twenty thousand dollars ($20,000), or by both a fine and imprisonment."

Section 11153 is part of the 1972 Uniform Controlled Substances Act (§ 11000 et seq., (the Act)) which is division 10 of the Health and Safety Code. Subdivision (a) of section 11153 states that only "practitioners" may issue prescriptions for controlled substances. "Practitioner," as defined elsewhere in the Act, includes doctors, dentists, veterinarians, podiatrists, and, in specified instances, pharmacists, registered nurses, and physician's assistants acting within the scope of authorized projects. (§ 11026.)

Subdivision (b) of section 11153 describes the punishment that may be imposed against any "person" who violates subdivision (a). "Person," as defined elsewhere in the Act, "means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, or association, or any other legal entity." (§ 11022.)

According to the prosecution's trial theory, Santos was the unlicensed "person" who violated section 11153 by knowingly issuing forged prescriptions for controlled substances. Dr. Gandotra, who gave Santos the prescription blanks bearing Dr. Gandotra's name and registry number, was the "person" who aided and abetted Santos in writing the illegal prescriptions.

On appeal, Dr. Gandotra contends neither he nor Santos may be convicted under section 11153. According to Dr. Gandotra, Santos is immune from prosecution because "section 11153 has been 'limited to physicians and pharmacists' (*People v. Anderson* [(1972)] 29 Cal.App.3d 551, 561)." And since Santos could not have violated the statute, Dr. Gandotra contends he cannot be guilty of having aided and abetted Santos.

The referenced passage in *People v. Anderson* (1972) 29 Cal.App.3d 551, 561, however, concerned a different statute, former section 11162.5, which was repealed by the Act. Former section 11162.5 provided: " 'A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner, but a corresponding liability rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of this division; and the person filling such an order, as well as the person using it, may be charged with violation of the law.' [Italics omitted.]" (*People v. Anderson, supra,* 29 Cal.App.3d at p. 559.)

In rejecting the defendant's claim in *Anderson* that the last sentence of section 11162.5 was unconstitutionally vague, the appellate court stated: "[W]e conclude that . . . section 11162.5, *by its terms limited to physicians and pharmacists,* is sufficiently certain and not unconstitutionally vague." (*People v. Anderson, supra,* 29 Cal.App.3d at p. 561, italics added.)

The *Anderson* court's dictum that former section 11162.5 was by its terms limited to physicians and pharmacists is neither controlling nor relevant to our determination of the broader scope of section 11153. When the Act was adopted in 1972, it replaced former division 10,

Narcotics, which was enacted in 1939. (Stats. 1939, ch. 60.) Parts of former division 10 were in turn derived from the 1929 "act to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances, and providing penalties for the violation thereof." (Stats. 1929, ch. 216, p. 380.)

Section 1 of the 1929 act provided in relevant part: "No person, other than a physician, dentist or veterinary surgeon, duly licensed to practice in this state, shall write any prescription for any of the drugs mentioned in this section. . . . " (Stats. 1929, ch. 216, § 1, at p. 380.) In addition, section 1 provided in relevant part: "It shall be unlawful for any practitioner of medicine, dentistry or veterinary medicine or any other person to . . . prescribe, administer to or furnish any of the foregoing substances for himself or any person not in the regular practice of his profession. . . . " (Stats. 1929, ch. 216, § 1, at p. 382.)

Section 6 of the 1929 act made a violation of section 1 punishable by imprisonment for not less than 6 months nor more than 6 years for the first offense, and by imprisonment for not less than 1 year nor more than 10 years for the second offense. (Stats. 1929, ch. 216, § 6, at p. 385.)

Reading section 11153 as a whole, we conclude the statute by its clear and unambiguous terms (1) prohibits nonpractitioners from writing controlled substance prescriptions, and (2) prohibits practitioners from writing controlled substance prescriptions that have no legitimate medical purpose and that are outside the course of their usual professional practice. These crimes have been on the books since at least the 1929 act.

We reject Dr. Gandotra's assertion that his section 11153 convictions have rendered section 11150 superfluous. Section 11150 states: "No person other than a physician, dentist, podiatrist, or veterinarian . . . shall write or issue a prescription." Notably, section 11150 does not specify any criminal punishment for a violation of its terms.

Section 11153 is a more specific statute than section 11150. Section 11153, unlike section 11150, sets forth the criminal punishment which may be imposed against any person who knowingly violates its terms. It thus appears that the Legislature intended to make the conduct described in subdivision (a) of section 11153 a crime without resort to section 11150, a more general statute which covers the same matter as section 11153. Accordingly, we distinguish *People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 434, which is relied upon by Dr. Gandotra.

In *Douglass*, a Business and Professions Code section which described unprofessional conduct without specifying a criminal punishment was held not to constitute a misdemeanor made punishable by an omnibus penalty section covering other sections which did not specify a penalty. The *Douglass* majority concluded that the omnibus penalty section was "reasonably susceptible of a construction that would exclude from its reach an act or omission which is declared only to be 'unprofessional conduct' and is not expressly described as a violation or crime. . . . [T]he construction urged by the People, whereby [the omnibus penalty section] would make criminal acts or omissions specified as 'unprofessional conduct,' would render superfluous those provisions

previously noted which expressly state that such conduct is criminal." (24 Cal.3d at p. 434.)

Here, on the other hand, section 11153, a more specific statute which imposes a criminal penalty for the same conduct proscribed by section 11150, may be considered an exception to section 11150 under the "supplanting" doctrine. (*People v. Pangelina* (1981) 117 Cal.App.3d 414, 422, fn. 4.) "The controlling principles are set forth in *In re Williamson* (1954) 43 Cal.2d 651, at page 654 [276 P.2d 593] as follows: ' "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication." ' " (*Lyons v. Municipal Court* (1977) 75 Cal.App.3d 829, 839.)

Moreover, we further distinguish *People v. Superior Court (Douglass), supra,* 24 Cal.3d 428, 434, on the ground that section 11153 contains no ambiguity and leaves no doubt as to its meaning. In construing a Penal Code section, "appellate courts first examine the language of the code section to determine whether the words used unequivocally express the Legislature's intent. If no ambiguity, uncertainty, or doubt about the meaning of the statute appear, the provision is to be applied according to its terms without further judicial construction. [Citation.]

[¶] When the language of the section is on its face ambiguous or leaves doubt, however, the court must resort to extrinsic aids to ascertain the purpose behind the statute and give the provision a judicially created meaning commensurate with that purpose. [Citations.]" (*Morse v. Municipal Court* (1974) 13 Cal.3d 149, 156; *In re Andrews* (1976) 18 Cal.3d 208, 212.)

Applying these rules here, we conclude the statutory language of section 11153 is conclusive. In a somewhat analogous situation, a minor who was found to have violated Penal Code section 288 (committing a lewd and lascivious [sic] on a child under age 14) and who was declared a ward of the juvenile court (Welf. & Inst. Code, § 602), challenged the application of Penal Code section 272, which "provides that '[e]very person' who commits an act which causes or encourages any person under the age of 18 years to become delinquent is guilty of a misdemeanor." (*In re James P.* (1981) 115 Cal.App.3d 681, 685.)

The *James P.* court rejected the minor's contention that Penal Code section 272 applies only to adult offenders, stating: "A statute free from ambiguity and uncertainty needs no interpretation. [Citations.] Interpretation of a statute is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not permitted. [Citation.] The term '[e]vey person,' as used in Penal Code section 272, is all-inclusive. It includes everyone, irrespective of whether the person is an adult or a minor. [Citation.] The term is specific, free from ambiguity, and therefore not subject to any construction other than a literal one." (*In re James P., supra,* 115 Cal.App.3d at p. 685.)

In this case, section 11153, subdivision (b), uses the similarly unambiguous and all-inclusive term, "[a]ny person." The term includes everyone, regardless of whether the person is licensed or unlicensed to write prescriptions. The term "is specific, free from ambiguity, and therefore not subject to any construction other than a literal one." (*In re James P., supra,* 115 Cal.App.3d at p. 685.)

D. The Other Section 11153 Decisions are not Controlling

By stating that controlled substance prescriptions "shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice" (§ 11153, subd. (a)), the Legislature has banned the writing of prescriptions by unlicensed assistants, without regard to whether the prescriptions were medically appropriate.

We acknowledge that the previously published section 11153 decisions did not involve prosecutions of licensed physicians for aiding and abetting their unlicensed assistants to violate the statute. They generally involved prosecutions either of licensed physicians for prescribing controlled substances to addicts (or undercover agents posing as addicts) without any legitimate medical purpose or appropriate medical examinations (see *People v. Lonergan* (1990) 219 Cal.App.3d 82, 89-92; *People v. Anderson, supra,* 29 Cal.App.3d at pp. 555-556), or of licensed pharmacists for indiscriminately filling controlled substance prescriptions not intended for

a legitimate medical purpose (see *Vermont & 110th Medical Arts Pharmacy v. Board of Pharmacy* (1981) 125 Cal.App.3d 19, 22-25).

The prior section 11153 decisions do not require or persuade us to conclude the statute may not be used to prosecute licensed physicians who aid and abet unlicensed assistants to write illegal prescriptions. As previously explained, the plain language of section 11153 is broader in scope than the reported decisions alone might suggest. As we read the unambiguous language of subdivisions (a) and (b) of section 11153, nonpractitioners may not issue even medically appropriate controlled substance prescriptions.

Had Dr. Gandotra, rather than Santos, written the challenged prescriptions, the prosecution's failure to prove the absence of a legitimate medical purpose would have been fatal. But because an unlicensed individual, rather than Dr. Gandotra, wrote the prescriptions, whether or not the prescriptions were medically appropriate is irrelevant.

We find nothing absurd about applying section 11153 literally in this case. (See *Isaac v. Superior Court* (1978) 79 Cal.App.3d 260, 264 ("Where the legislative intent is clear, penal statutes must be construed reasonably to effectuate such intent. They should not be read literally where to do so would lead to absurd consequences. [Citations.]").) The fact that Dr. Gandotra and Santos intended and caused no harm to their unsuspecting Medi-Cal patients does not make the application of section 11153 absurd. Since at least 1929, California has made it a crime for an unlicensed person to issue controlled substance

prescriptions. The medical licensing board, not an individual physician-employer, must determine an employee's qualifications to issue controlled substance prescriptions. Whether the unlicensed assistants, by luck or by skill, issued appropriate prescriptions in this case is not determinative of whether Santos, with Dr. Gandotra's assistance, violated section 11153. The adoption of Dr. Gandotra's position essentially would repeal the prohibition against unlicensed medical practice unless the treatment harmed a patient. We think the Legislature properly could take the safer course and proscribe *any* unlicensed medical practice, even if the treatment did not injure the patient.

We find the verdicts on counts 6 and 10 are supported by substantial evidence.

E. Instructional Error

Dr. Gandotra next contends the trial court erroneously instructed the jury as follows: "The defendant Dr. Gandotra is charged in counts 6 and 10 of the information with having committed the crime of aiding and abetting in the issuance of a prescription for a controlled substance without legitimate medical purpose while not acting in the usual course of the medical practice, a violation of Section 11153(a) . . . which states:

"Any person who knowingly issues a prescription for a controlled substance other than for a legitimate medical purpose while not acting in the usual course of the medical practice, is guilty of the crime of prescribing a controlled substance without legitimate medical purpose, a felony[.]

"In order to prove the crime, each of the following elements must be proved:

"1. That a person knowingly issued a prescription for a controlled substance;

"2. That a person was not acting in the usual course of the medical practice when the prescription for a controlled substance was issued;

"3. That the defendant Dr. Gandotra aided and abetted in the issuance of a prescription for a controlled substance(s), in violation of Section 11153(a). . . . "

Dr. Gandotra contends this instruction was erroneous for two reasons. First, practitioners are the only persons within the ambit of section 11153, which does not reach any other persons as was erroneously implied in the instruction. And second, the instruction omitted an essential element of a section 11153 violation – the absence of a legitimate medical purpose in prescribing the drugs.

We previously discussed and rejected both of these contentions. Accordingly, we find no instructional error.

II

Dr. Gandotra was convicted on count 8 for aiding and abetting Santos in furnishing an undercover agent with two tablets containing Tylenol with codeine #3, a Schedule III controlled narcotic drug (§ 11056, subd. (e)), in violation of section 11352, subdivision (a). Dr. Gandotra contends count 8 must be reversed because section 11352 was aimed at curbing illicit drug trafficking and not the mere dispensing of two common analgesic tablets. We disagree.

Agent McSween, posing as patient Smith, went to the clinic and complained of an earache. Santos examined Smith and signed Dr. Gandotra's name on prescriptions for eardrops, an antibiotic, and Tylenol with codeine #3, a Schedule III controlled substance (§ 11056, subd. (e)). When Smith said she needed something for her immediate pain, Santos gave her two tablets of Tylenol with codeine #3.

As a result of Santos' treatment of Agent McSween, Dr. Gandotra was charged with and convicted of aiding and abetting Santos in (1) forging a prescription (Bus. & Prof. Code, § 4390, count 7), (2) unlawfully furnishing a controlled substance (Health & Saf. Code, § 11352, count 8), and (3) practicing medicine without a license (Bus. & Prof. Code, § 2052, count 9).

The trial court fined Dr. Gandotra $10,000 on count 7, $20 000 on count 8, and $1,000 on count 9. In the unpublished portion of the opinion, we stay the multiple fines imposed on counts 7 and 8 in violation of Penal Code section 654.

Section 11352, subdivision (a) provides in relevant part: "Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away . . . (2) any controlled substance classified in Schedule III . . . which is a narcotic drug, unless upon the written prescription of a physician . . . licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years."

Dr. Gandotra contends his conviction under this narcotics trafficking statute "is nothing short of absurd,"

since the two common analgesic tablets were issued in good faith to a "patient" who had complained of an earache. Dr. Gandotra asserts an exception must be allowed for the good faith furnishing of two common analgesic tablets following a medical examination by a foreign medical graduate.

In our view, however, Dr. Gandotra's license to practice medicine does not make him immune from prosecution under section 11352 for aiding and abetting an unlicensed person to dispense a controlled substance. Section 11352's exception for prescriptions by licensed physicians would only be applicable if Dr. Gandotra personally had prescribed and dispensed the controlled substance to Agent McSween.

We distinguish *Baker v. Superior Court* (1972) 24 Cal.App.3d 124, upon which Dr. Gandotra relies. In *Baker,* a licensed physician was charged with violating former section 11912 (now § 11379) by writing prescriptions (which were never filled) for restricted dangerous drugs upon request without first examining the "patients" (who were undercover agents) to establish a medical necessity. Former section 11912 punished, among other things, the furnishing of " 'any restricted dangerous drug, except upon the prescription' " of a physician. (*Baker v. Superior Court, supra,* 24 Cal.App.3d at p. 126.) The majority in *Baker* concluded a physician may not be prosecuted under former section 11912 for prescribing a restricted dangerous drug without a medical examination.

Recently, another appellate court disagreed with the *Baker* majority opinion and held that "a physician who

prescribes and, pursuant to that prescription, sells a controlled substance without a legitimate medical purpose can be tried for violating section 11379 [(former section 11912)]." (*Perzik v. Superior Court* (1991) 2 Cal.App.4th 898, 899.) The *Perzik* court concluded *Baker* was not dispositive for two reasons: "The *Baker* majority based its conclusion on (1) the factual circumstance that 'no drugs were ever obtained by means of the[] prescriptions' written by the physician, and (2) a legal examination of the statutory scheme that differentiated between narcotics and what were then classified as restricted dangerous drugs. [Citation.] Here, controlled substances were obtained from petitioner. Moreover, subsequent to *Baker* the Legislature enacted a massive reorganization of the statutory scheme, thereby largely obliterating the distinction between narcotics and all other controlled substances. (See Stats. 1972, ch. 1407, § 3.)" (*Perzik v. Superior Court, supra,* 2 Cal.App.4th at p. 901.)

We agree with the *Perzik* court's analysis of *Baker* and find that *Baker* is not dispositive of this case. Here, as in *Perzik* and unlike *Baker,* the undercover agent actually received a controlled substance. While there was no evidence that the drug in this case was medically inappropriate, the statute does not require such evidence when the charge is based on the furnishing of a controlled substance by an unlicensed person. Section 11352 specifically forbids "every person" from distributing controlled substances "unless upon the written prescription of a physician . . . licensed to practice in this state." " 'Physicians are not excluded from the definition of the word "person" and it is apparent that all persons, including physicians, are thereby forbidden under liability of

criminal prosecution to furnish or sell any [nonnarcotic controlled substance] except as otherwise provided in the statute.' [Citation.]" *Perzik v. Superior Court, supra,* 2 Cal.App.4th at p. 901.)

Dr. Gandotra may not rely on the medical appropriateness of Santos' illegal prescription to escape liability under section 11352 because Santos is not a licensed physician. Section 11158, subdivision (a) provides, among other things, that "no controlled substance classified in Schedule III . . . may be dispensed without a prescription meeting the requirements of this chapter." It is undisputed that Santos dispensed a Schedule III drug (Tylenol with codeine #3) without meeting the statutory requirements.

We reject Dr. Gandotra's assertion that this "conduct in aiding and abetting Santos did not fall outside the scope of a physician's legitimate and usual course of practice in diagnosing and treating patients. . . . " There is no authority for the proposition that physicians may permit unlicensed medical assistants to prescribe controlled substances on the physician's official blank prescription forms and distribute small quantities of such controlled substances. The jury was entitled to find that Dr. Gandotra's conduct in aiding and abetting Santos constituted a violation of the statute.

We also reject Dr. Gandotra's assertion that his conviction under section 111352 "push[ed] the criminal law beyond legitimate reason." Codeine #3 is without doubt a controlled substance, and the statute on its face prohibits the dispensing of a controlled substance without a valid prescription by a licensed physician. The Legislature did

not exempt (as it could have) all licensed physicians from section 11352. Instead, the statute by its terms reaches "every person." For the reasons stated in part I, we conclude the unambiguous term needs no construction and should be applied literally.

III

The defendants contend the trial court abused its discretion by failing to discharge a juror who became unable to perform his duty during deliberations. We disagree.

After a day and a half of jury selection, the trial commenced on February 23, 1990. The jury started deliberating on March 20, 1990, the 17th day of trial. On the following morning, after having deliberated for only two hours the previous day, juror Ramesh Kothari sent the trial court a note asking to be removed from the jury: "I as member of jury feel uncomfortable on way quick decision is reached. I feel like I am 1 against 11 in the room defending why I did not feel 'eviden[c]e' was presented during trial. In short period of 45 minutes 4 or 5 counts were determined – Some [of] this even before understanding instructions or reviewing evidence. My conclusion – I can[]not defend how I feel to 11 jurors on every count and I like to be . . . taken off the jury."

The trial court discussed Kothari's note with both counsel, and denied defense counsel's first mistrial motion which was based on the note's contents. The trial court then called Kothari into chambers and questioned him in the presence of both counsel.

In chambers, Kothari objected to the jury's deliberating process, stating "some decisions are getting reached without looking at the aspects of the matter, and it's bothering me quite a bit." Kothari found it "very difficult" to deliberate when the others were making decisions "before any discussions" were held. Kothari disliked having to explain his position to the other 11 jurors who were "badgering" him: "[A]s soon as I do not vote everybody's working on me, and I look like I'm becoming [the] defendant, and I don't want to sit there for three days doing that, because it's not my job to, so I'm very, very uncomfortable. As soon as I do something they are all badgering me. [¶]. . . . [¶] [I]f I say, 'Let's look at this, let's read this, and all understand it', they all have their own interpretation of what's written, and I get three interpretation [sic]."

When the trial court explained it was Kothari's duty to listen, exchange views, and vote according to his conscience, Kothari responded: "But I think it's unfair for me to be looking through everything when others are just – their minds are made up, in my way, and I don't want to defend everything myself. That's unfair to be asked for me. I'm . . . I want to be unbiased and objective, but there is no chance to be. . . . "

The trial court then stated: "What I'm going to do is ask you to step back in the juryroom, deliberate further, then I'm going to have an additional instruction I have to give to the jury regarding a charge. [¶] I'll read it to you when all of you are there, then I'll remind you of that instruction I'll read to you. You listen to those instructions with the other jurors, and they will be available for you to read them, and all I can do is remind you of your

duty, and you must vote your conscience, you understand that?"

Kothari again responded that this was unfair: "You say one thing, but when I work different way, then I feel like I'm answering to different people, and that's unfair. That's – it's causing me a lot of stress and pain, and I'm losing sleep at night. [¶] I don't want to answer to them why I feel one way or the other way, and that's what my difficulty is. You're saying to do my duty. When I do my duty then I have to – and I have to open up the things which everybody should look at, and I feel like that's unfair."

The trial court reiterated Kothari's duties to "vote [his] conscience," "discuss the case in its entirety," and stand by his convictions even if he was in the minority. The trial court pointed out that just as he was entitled to his own religious beliefs, he was entitled to believe the defendants were guilty or innocent, provided he considered all the evidence and deliberated with the others as he was instructed.

Kothari then recounted how, when the jury voted six or eight times the previous day, he had changed his vote "just to accommodate the feeling[s]" of the others. Kothari indicated he had not been able to vote according to his conscience.

The trial court again encouraged Kothari to stand by his view of the evidence if he felt he was right, and not to change his vote unless convinced the others were right. The trial court told Kothari "[t]here's nothing they can do to you"; "go back there and do the best you can, and . . . vote your conscience. . . . "

Kothari replied: "It's easy for you to say it, and as soon as I vote my conscience we are not moving, and I'm answering those eleven people, so it's really – what you saying [sic] makes sense in this room, but doesn't help me a bit as soon as I get out."

The trial court responded: "Go back there and try it again, and if you continue to have problems we'll look into the matter a little later on, okay? Go back in the juryroom, or at least the clerk will bring you back, and we'll go from there." Kothari replied: "Okay. Thank you."

After Kothari left the chambers, defense counsel renewed his mistrial motion. The trial court reserved its ruling, stating (among other things): "I'm not satisfied exactly how this thing is going. There's room for doubt. I'm going to give the matter further thought."

The trial court then brought the jury into the courtroom and reread CALJIC Nos. 17.40 (5th ed. 1988) and 17.41 (1989 rev.): "The People and the Defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision. [¶] Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination."

"The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the

beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts."

The trial court received no further communication from Kothari. The next day, the jury returned guilty verdicts on all 17 counts. When polled, Kothari confirmed his guilty vote on each count.

On appeal, defendants contend the trial court abused its discretion by denying the second mistrial motion.[3] Defendants assert the jury would not have been able to reach a 17-count verdict after deliberating for only about two days if Kothari had stood by his convictions. Defendants state in their opening brief: "The conclusion is inescapable: had juror Kothari actually continued to raise questions, voice his opinions, and defend his position

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[3] The defendants' opening and reply briefs appear inconsistent as to whether the trial court expressly denied the second mistrial motion. According to the opening brief, the trial court abused its discretion by either failing to rule or implicitly denying the second motion (but not by expressly denying the motion). When the respondent's brief claimed the issue had been waived due to the defendants' failure to press for ruling below, the defendants stated in their reply brief that the trial court had indeed ruled on the second motion. The defendants cited a (post-verdict) transcript page where the trial court stated: "So there's no doubt in the record, the motion was denied then, and it's denied again."

In or view, the trial court expressly denied the second mistrial motion, and there was no waiver.

following the resumption of deliberations, it would have been next to impossible for the jury to reach decision[s] on so many counts, in so short a time. If, on the other hand, it is posited that juror Kothari 'accommodat[ed]' . . . the other jurors, then the quick verdicts are readily explained."

The transcript of the in-chambers discussion with Kothari supports conflicting inferences on Kothari's ability or willingness to vote according to his conscience. On the one hand, Kothari changed his vote after being badgered by the other jurors, and he was reluctant to stand up to the others and remind them of the instructions and evidence. On the other hand, when the trial court returned him to the jury room after ordering him to try again and do his best, Kothari finally agreed without further complaint.

Based on the conflicting inferences, we do not believe the trial court was required to dismiss Kothari as a matter of law. (See 9 Witkin, Cal. Procedure (3d ed. 1985) appeal, §§ 288-289, pp. 300-302.) The trial court properly handled Kothari's dismissal request by reminding him of his obligations, encouraging him to try again, instructing him to notify the court of any further difficulties, and rereading CALJIC Nos. 17.40 and 17.41 to the jury. Under these circumstances, the decision to leave Kothari on the panel was not an abuse of discretion; Kothari made no further request to be removed from the jury, and Kathari [sic] affirmed each of the guilty verdicts upon being polled by the trial court.

Although the trial court initially had doubts concerning Kothari's willingness to stand up to the others,[4] we must accept the trial court's inference that Kothari had returned to the jury room with a new resolve to faithfully execute his duties as a juror.

The trial court's delay in ruling on the second motion does not establish an abuse of discretion. Nor does the jury's quick resolution of the case a day later establish, as a matter of law, that Kothari compromised his position to accommodate the other jurors.

The decision to dismiss or not dismiss a juror for good cause rests in the discretion of the trial court. (See

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[4] Upon reserving its ruling on the second mistrial motion, the trial court expressed its doubts as follows: "The question in my mind is this, is he qualified as a juror. I'm not too sure at this point that he is qualified as a juror, that he does not take his duties – he takes his duties seriously, but he does not want to follow the court's instructions. [¶]. . . . [¶] . . . What I'm trying to instill into him now is he should not change his vote merely because eleven other jurors have a contrary opinion. He must change his opinion only when he feels that he can agree with their conclusion. [¶] My impression at the moment is that he is really not qualified at this time to do his duty. I'm going to continue him on as a juror. I'm going to think further for cause in this particular matter, and I'm also going to give further thought to a mistrial. . . . "

The trial court further stated: "What he was saying to me is that he doesn't want to stand up to his conscience, and if he doesn't want to stand up to his conscience then he's not fulfilling his obligation as a juror. [¶]. . . . [¶] What he is saying is that . . . he cannot necessarily follow the instructions, he cannot necessarily make a decision according to his conscience, he can be influenced by eleven other people. That's what disturbs me. The numbers bother him."

Pen. Code, § 1089; *People v. Warren* (1986) 176 Cal.App.3d 324, 326-327.) Based on his record, we find no abuse of discretion.

People v. Hecker (1990) 219 Cal.App.3d 1238, 1242-1245, was recently brought to our attention by appellants' counsel. There, the appellate court affirmed the trial court's decision excusing a juror who felt she could no longer be objective after having seen the defendant at her church. *Hecker* does not change our conclusion that the trial court here acted within its discretion in refusing to excuse juror Kothari.

IV

Dr. Gandotra was convicted of five felony counts of presenting false Medi-Cal claims (Welf. & Inst. Code, § 14107, hereafter section 14107, counts 11-15), and Mrs. Gandotra (who handled Medi-Cal billing for the clinic during part of this period) was convicted as an aider and abetter on three of those counts (11, 12, and 15). Both defendants contend the convictions must be reversed due to instructional errors. We disagree.

At trial, Robert Pierson, a manager in the Medi-Cal Program for the State Department of Health Services, testified that Medi-Cal will not pay for services rendered by persons who were unlicensed to provide those services. Pierson testified that a licensed physician who wishes to treat Medi-Cal patients must first apply to become a Medi-Cal provider and obtain a Medi-Cal provider number, which is a unique billing number. Thereafter, the enrolled physician may bill Medi-Cal by filling out a Medi-Cal Professional Supplier Claim Form, which

requires the provider's billing number to be written in Box 2 on the form. If a licensed person other than the enrolled physician renders services, that person's billing number must also be written in Box 43 on the form. But if an unlicensed person in the enrolled physician's office renders unauthorized services, Medi-Cal will not pay the claim. The enrolled physician must sign the form and thereby attest to the accuracy of the information and that he has read the back of the form. The back of the form states that the services listed on the form were personally provided by the enrolled physician or under his direct supervision, and that the people providing the services were licensed to do so.

The Medi-Cal claim forms at issue in counts 11-15 were all filled out with Dr. Gandotra's provider number in Box 2. Box 43 was left blank on each of the forms. Dr. Gandotra did not provide or directly supervise the medical care at issue in counts 11-15. Neither of the actual providers (Cuellar in counts 11 and 12, and Saunders in counts 13-15) had either a license to provide medical care or a Medi-Cal provider number. The prosecution also presented substantial evidence that medical services described on the forms were not actually provided.

Based on the above, the jury convicted Dr. Gandotra and Mrs. Gandotra of violating section 14107, which provides in relevant part:"Any person who, with intent to defraud, presents for allowance or payment any false or fraudulent claim for furnishing services or merchandise, knowingly submits false information for the purpose of obtaining greater compensation than that to which he is legally entitled for furnishing services or merchandise, or knowingly submits false information for the purpose of

obtaining authorization for furnishing services or merchandise under this chapter or Chapter 8 (commencing with Section 14200) is punishable by imprisonment in the county jail not longer than one year or in the state prison, or by fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment."

The trial court gave the following special instruction: "The defendants Suresh & Rita Gandotra are jointly charged in Counts 11, 12, and 15 of the information with aiding and abetting violation[s] of . . . §14107. Suresh Gandotra is charged in Counts 13 and 14 only. The presentation of a false Medi-Cal claim with intent to defraud is a violation of [§]14107 . . . which states:

"Any person who with specific intent to defraud, presents or causes to be presented to the Medi-Cal Program any false claim for payment for furnishing services or merchandise is guilty of the crime of presenting a false [M]edi-[C]al claim with intent to defraud, a felony.

"In order to prove this crime, each of the following elements must be proved:

"1. That the defendant Dr. Gandotra presented or caused to be presented to the Medi-Cal Program a false claim for payment for furnishing services or merchandise;

"2. That the defendant Dr. Gandotra knew the claim was false [;]

"3. That the defendant Dr. Gandotra acted with the specific intent to defraud the Medi-Cal Program [;]

"4[.] That the defendant Rita Gandotra aided and abetted defendant Dr. Gandotra in presenting false claims."

On appeal, defendants contend the trial court erred by failing sua sponte to "define the term knowingly or to tie that element in with the requirement that the People prove appellants knew of the specific Medi-Cal regulations they had violated."

" 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.)

In support of their position that the trial court failed to instruct on all the elements of section 14107, defendants cite *People v. Gregory* (1990) 217 Cal.App.3d 665, 676-681. In *Gregory*, however, the charged offense was for a different type of section 14107 violation, namely, that the physician had "knowingly submit[ted] false information for the purpose of obtaining greater compensation than that to which he [was] legally entitled for furnishing services or merchandise. . . . " (§ 14107.)

Unlike Dr. Gandotra, the physician in *Gregory* had personally examined his Medi-Cal patients. There were no allegations in *Gregory* of examinations which had never occurred or had been conducted by unlicensed

persons. The dispute in *Gregory* was whether the examinations were as lengthy or involved as the physician had claimed on the billing forms, where he listed them as "Intermediate" on a scale ranging from "Minimal," "Brief," "Limited," "Intermediate," "Extended," "Comprehensive," and "Unusually Complex." (*People v. Gregory, supra,* 217 Cal.App.3d at pp. 679, 682.) According to the prosecution's expert testimony in *Gregory,* the physician's brief and cursory examinations were not "Intermediate" examinations.

On appeal, the *Gregory* court concluded that the physician's knowledge of the relevant Medi-Cal regulation was an element of the offense. (*People v. Gregory, supra,* 217 Cal.App.3d at pp. 676-681.) The court upheld his conviction after finding that was substantial evidence he "knew the examinations he performed were not 'intermediate examinations' as defined by Medi-Cal and that he knowingly submitted false and fraudulent claims for services in violation of section 14107." (*People v. Gregory, supra,* 217 Cal.App.3d at p. 680.)

Relying on *Gregory,* defendants claim the court below should have instructed the jury on its own motion that proof of Dr. Gandotra's knowledge of the pertinent Medi-Cal regulations was an element of the offense. *Gregory,* however, does not require such a sua sponte instruction in this case. As previously noted, the defendant's conviction in *Gregory* resulted from a different type of section 14017 violation. Unlike *Gregory,* the prosecution's theory in this case was that Dr. Gandotra was entitled to *zero* (rather than less) compensation.

The jury was properly instructed in this case that the prosecution had to prove Dr. Gandotra "knew the claim was false." Defendants claim this instruction was insufficient and prejudicial because the prosecution had failed to prove that Dr. Gandotra understood the pertinent Medi-Cal billing rules. But in our view, any reasonable juror would have understood that if Dr. Gandotra was unaware that Medi-Cal would not pay for services rendered by unlicensed providers, then he was not guilty of violating section 14107.

Defendants also claim the lack of an additional instruction was prejudicial because there was evidence that Dr. Gandotra was confused about the difference between licensed physician's assistants and unlicensed medical assistants. Defendants stated in their reply brief: "For instance, while the jury could have concluded that Dr. Gandotra knew or should have known that the authority he granted the foreign medical graduates exceeded their qualifications to practice medicine, the billing for services which did not exceed the proper function of a physician's or medical assistant presents a different question which could only be resolved on the basis of his knowledge of Medi-Cal billing regulations."

If we properly understand this statement, defendants are claiming they were prejudiced by the jury's failure to consider their *defense* that Santos and Cuellar were authorized to perform at least some of the services without a license. We are unaware and uninformed, however, of any evidence to support this defense. The trial court was not obliged to instruct the jury on its own motion concerning this unsupported defense. "Unlike the rule obliging the court to instruct on lesser included offenses and

to give requested instructions whenever there is 'any evidence deserving of any consideration whatsoever' [citation], the duty to give instructions, *sua sponte*, on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno, supra,* 10 Cal.3d at p. 716.)

If the defendants wished to have an additional special instruction on knowledge, they should have requested one. "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citations.]" (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

We conclude the trial court did not err by failing to give on its own motion an additional instruction on knowledge.

We turn to defendants' second allegation of instructional error. Defendants contend it was error for the court not to instruct on its own motion that the jurors must unanimously agree on which of two separate acts constituted a section 14107 violation in each of counts 11-15. Defendants assert each count involved separate acts of filing a false claim for services never rendered, and of filing a false claim for services provided by unlicensed personnel. We disagree.

Each of counts 11-15 involved only one act, namely, the single presentation of a false claim. The fact that each

claim was potentially false for two reasons does not mean that two false claims were presented or that two acts were committed in each count. On the contrary, only one false claim (one act) was at issue in each count. Accordingly, it was unnecessary to have all 12 jurors concur as to why each claim was false, so long as the jurors unanimously agreed on each count that the presenting of the false claim violated section 14107 beyond a reasonable doubt.

For example, in *People v. Forbes* (1985) 175 Cal.App.3d 807, the court ruled that a unanimity instruction was unnecessary even though "two theories – direct perpetration or aiding and abetting –" of first degree murder had been presented to the jury. (*Id.* at p. 816.) The *Forbes* court stated: "Where the evidence shows more than one act which could constitute the charged offense and the prosecution does not elect to rely on any one such act, a unanimity instruction is usually required. [Citations.] However, such instruction has uniformly been held unnecessary where a single charged offense is submitted to the jury on alternative legal theories of culpability, a common example being where a charge of first degree murder is supported on alternate theories of felony murder or willful, deliberate and premeditated killing. [Citation.] It is held sufficient that each juror is convinced beyond a reasonable doubt that the defendant committed the offense *as that offense is defined by statute.* [Citations.]" (*Id.* at pp. 816-817.)

"The duty to instruct with CALJIC No. 17.01 [unanimity instruction] exists where the defendant is charged in one count with multiple offenses. [Citations.]" (*People v. Perryman* (1987) 188 Cal.App.3d 1546, 1550.) That was not the case here.

V

Dr. Gandotra contends the fines imposed on counts 2, 5, 7, 9, 11-15, and 17 violated Penal Code section 654. In addition, defendants contend the cumulative fines and penalty assessments were unconstitutionally excessive and imposed without due process under state and federal constitutions.

Preliminarily, we address the People's contention of waiver. The respondent's brief asserts the defense waived any sentencing issue by failing to raise them below. The reply brief, however, points out that the defense objected to the monthly income figure of $90,000 contained in the probation officer's report, and that the defense proposed restitution of $8,600 and fines of $40,000. The reply brief further contends that "if anyone should be estopped from arguing that the full measure of fines and assessments imposed should be affirmed, it is respondent."

The People were represented at trial and sentencing by Deputy Attorney General Richard J. Rojo. Rojo submitted a May 16, 1990, letter outlining the People's sentencing recommendation, which was included in the probation officer's presentence report (Cal. Rules of Court, former rule 419(a)(7)(i), now renumbered as rule 411.5(a)(7)(i)).

In his letter, Rojo acknowledged and conceded several Penal Code section 654 issues and thus recommended *against* imposing fines on counts 2, 5, 9, and

11-15.[5] The trial court implicitly disagreed with the People's recommendation and imposed $347,800 in fines.

Based on his record, we find no evidence of a waiver concerning the section 654 issues. The cases cited by the People (*People v. Rogers* (1978) 21 Cal.3d 542, 547-548; *People v. Webb* (1986) 186 Cal.App.3d 401, 411-412) are distinguishable.

A. Penal Code Section 654

Section 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such

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[5] Rojo's letter recommended fines of:

"1) $10,000 for Grand Theft (Count 16). The people elect not to use any of the separate occurrences of false claims [(Counts 11-15)] for purposes of a fine recommendation. *Since the grand theft is part of an overall plan, Dr. Gandotra should not be fined for the false claim counts which ultimately constitute the grand theft* (See *People v. Brooks* (1985) 166 CA3d[ ]24).

"2) $40,000 for violations of Health and Safety Code § 11153(a) (Counts 6&10). . . .

"3) $30,000 for violations of Business and Professions [Code] § 4390 (Counts 1, 3, and 7).

"Pursuant to P.C. § 654, Count 1 includes the charges alleged in Count 2; and Count 6 above includes the charges alleged in Count 5. Therefore, prosecution [sic] [punishment] for acts alleged under Count[s] 2 and 5 are barred, and only Counts 1, 3, and 7 with respect to B&P § 4390 are considered.

"4) $10,000 for a violation of Health and Safety Code § 11352 (Count 8).

"Count 8 includes conduct alleged in Count 9, the unlawful practice of medicine. Consequently, prosecution [sic] [punishment] of Count 9 is barred under P.C. § 654.

"5) $10,000 for conspiracy (Count 17). . . . " (Italics added.)

provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

Section 654 "literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]

"If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

" '[T]he question of whether the acts of which a defendant has been convicted constituted an indivisible course of conduct is primarily a factual determination,

made by the trial court, on the basis of its findings concerning the defendant's intent and objective in committing the acts. [Citations.] This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citation.]" (*In re William S.* (1989) 208 Cal.App.3d 313, 318.)

If the defendant " 'entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' (*People v. Beamon* [(1973)] 8 Cal.3d [625,] 639.)" (*People v. Bowman* (1989) 210 Cal.App.3d 443, 448.)

With this background in mind, we turn to Dr. Gandotra's contentions.

1. Counts 1 and 2

Counts 1 (forging a prescription, Bus. & Prof. Code, § 4390) and 2 (practicing medicine without a license, Bus. & Prof. Code, § 2052) involved Cuellar's treatment of Agent Fuentes (patient Camarillo), who had complained of an arm injury and was given a forged prescription for Ibuprofen.

The trial court fined Dr. Gandotra $10,000 on count 1 and $1,000 on count 2. Dr. Gandotra contends the $1,000 fine on count 2 violated section 654's prohibition against multiple punishments for the same course of conduct. We agree.

The underlying motivation for Dr. Gandotra's hiring of unlicensed, foreign-trained medical assistants was to maximize profits. There was no evidence of inappropriate medical care. The prescription which Cuellar wrote was challenged solely because Cuellar was unlicensed. Accordingly, the evidence does not support the inference that practicing medicine and prescribing drugs without a license were independent objectives rather than an indivisible course of conduct. The fact that Cuellar forged an otherwise appropriate prescription in the course of treating Camarillo without a license does not demonstrate there were multiple criminal objectives independent of and not merely incidental to each other.

We further note that Business and Professions Code section 2052 (count 2) covers, under a single statute, multiple acts including *practicing* or attempting to practice medicine, diagnosing, treating, or *prescribing without a license.*

We conclude that the $1,000 fine on count 2 violated section 654's prohibition against multiple punishments for the same course of conduct.

2. Counts 5 and 6

Counts 5 (forging a prescription, Bus. & Prof. Code, § 4390) and 6 (issuing an unlawful prescription for a controlled substance, Health & Saf. Code, § 11153) involved Santos's treatment of Agent Milne (patient Scott), who had complained of sleeplessness and itching and was given a prescription for Diazepam, or Valium, a Schedule IV controlled substance (Health & Saf. Code, § 11057, subd. (d)(7)).

The trial court fined Dr. Gandotra $10,000 on count 5 and $20,000 on count 6. Dr. Gandotra contends the $10,000 fine on count 5 must be stayed under section 654 as a multiple punishment for the same course of conduct as in count 6, since both counts involved the issuance of the very same prescription. We agree.

The record indicates Dr. Gandotra's underlying motivation for hiring unlicensed, foreign-trained medical assistants was to maximize profits. There was no evidence of inappropriate medical care. The forged prescription which Santos wrote was not proven medically inappropriate; the prescription was challenged solely because Santos was unlicensed.

For the reasons previously stated, we believe the evidence fails to support the inference that Dr. Gandotra had several objectives constituting two divisible offenses. We conclude the $10,000 fine on count 5 must be stayed under section 654.

3. Counts 7, 8, and 9

Counts 7 (forging a prescription, Bus. & Prof. Code, § 4390), 8 (unlawfully furnishing a controlled substance, Health & Saf. Code, § 11352), and 9 (practicing medicine without a license, Bus. & Prof. Code, § 2052) involved Santos's unlicensed treatment of Agent McSween (patient Smith). When Smith complained of an earache, Santos examined her and prescribed eardrops, an antibiotic, and Tylenol with codeine #3, a Schedule 3 controlled substance (Health & Saf. Code, § 11056, subd. (e)). When Smith said she needed something for her immediate pain, Santos gave her two tablets of Tylenol with codeine #3.

The trial court fined Dr. Gandotra $10,000 on count 7 (forging a prescription), $20,000 on count 8 (unlawfully furnishing a controlled substance), and $1,000 on count 9 (practicing medicine without a license). Dr. Gandotra contends the $10,000 fine on count 7 and the $1,000 fine on count 9 must be stayed under section 654 as multiple punishments for the same course of conduct as in count 8, since all three counts involved one intent, namely the unlawful practice of medicine.

We agree for the reasons stated in sections 1 and 2 above. The $10,000 fine on count 7 and the $1,000 fine on count 9 are stayed under section 654.

4. Counts 11-15 and 17

Counts 11 through 15 charged five separate Medi-Cal fraud violations (Welf. & Inst. Code, § 14107) pertaining to bills submitted for treating two undercover agents (counts 11, 12) and three regular Medi-Cal patients (counts 13-15) on dates when they were not even at the clinic. The trial court imposed the maximum $5,000 fine plus penalty assessments on each of counts 11 through 15.

Count 16 charged both defendants with grand theft (Pen. Code, § 487), and count 17 charged both defendants with criminal conspiracy to file false Medi-Cal claims (Pen. Code § 182, subd. (a)(4)). The trial court ordered Dr. Gandotra to pay a $10,000 fine on each of counts 16 and 17.

In his opening brief, Dr. Gandotra contended the $10,000 fine on count 17 must be stayed pursuant to

section 654 "because the alleged objective of the conspiracy, Medi-Cal fraud, and each and every overt act related thereto, was separately punished in the substantive[ ] crimes alleged in Counts [11] through [15]." In support of this position, Dr. Gandotra cited *People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-617.

In his reply brief, Dr. Gandotra raised an additional assertion that the fines imposed on counts 11 through 15 violated section 654 because the intent to commit Medi-Cal fraud was indivisible from the intent to commit grand theft (Pen. Code, § 487, count 16). (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30-32.) The reply brief pointed out that in prosecutor Rojo's sentencing letter, the People proposed that a $10,000 fine be imposed for grand theft (count 16), but that under section 654, *no* fines be imposed on the Medi-Cal fraud counts (counts 11-15). Rojo's letter stated: "Since the grand theft is part of an overall plan, Dr. Gandotra should not be fined for the false claim counts which ultimately constitute the grand theft (See *People v. Brooks* (1985) 166 C[al.]A[pp.]3d [ ] 24)."

With respect to this concession, Dr. Gandotra's reply brief stated: "Appellants gladly accept respondent's election to honor section 654's application to the $5,000 fines imposed on each of the five Welfare and Institutions Code section 14107 charges (counts [11] through [15]), a total of $25,000, in favor of the $10,000 fine for grand theft (Count [16]) (all adjusted for penalty assessments). . . . However, that does not undercut the necessity to stay Dr. Gandotra's $10,000 fine imposed for the conspiracy count (Count [17]) as well."

We agree that the fines imposed on counts 11 through 15 must be stayed pursuant to section 654. (*See People v. Brooks, supra,* 166 Cal.App.3d at pp. 30-31.) The prosecution's theory (as illustrated by Rojo's letter) was that Dr. Gandotra had an overall plan and that the false claim counts were part of that single plan. Accordingly, there was but a single punishable offense of grand theft under section 654, and the fines and corresponding penalty assessments imposed on counts 11 through 15 must be stayed.

Turning to count 17, however, we disagree with Dr. Gandotra's assertion that a double punishment was imposed on both the conspiracy (count 17) and the substantive offenses which were the object of the conspiracy (counts 11 through 15). By staying the punishments on the substantive offenses (counts 11 through 15), we have eliminated any possible double punishment for both the conspiracy and the substantive offenses. Accordingly, we distinguish *People v. Ramirez, supra,* 189 Cal.App.3d at p. 615.

We further note that this is not a case of double punishment. "Double punishment occurs when a conspiracy has multiple objects and *all* are punished as substantive offenses, just as when the conspiracy has but one object which is punished as a substantive offense. [Citation.]" (*People v. Ramirez, supra,* 189 Cal.App.3d at p. 616.) In this case, the prosecution produced evidence of a conspiracy covering several years and of incidents other than those alleged in counts 11 through 15. The Department of Justice investigator, Kathy Rodriguez, testified that the total fraud committed against Medi-Cal was

about $722,000. Accordingly, we reject Dr. Gandotra's claim of double punishment on count 17.

B. Constitutional Challenge

The total amount of fines imposed against Dr. Gandotra was $148,000, plus penalty assessments of $199,800, for a grand total of $347,800.

Because we have stayed the fines imposed on counts 2, 5, 7, 9, 11 through 15, the total fines have been reduced to $101,000. In addition, the penalty assessments must also be reduced. According to Dr. Gandotra, the record does not give a "percentage breakdown of penalty assessments." Dr. Gandotra contends that mathematical calculations demonstrate that "the penalty assessments represented 135 of the total dollar amount of fines imposed ($199,800 in penalty assessments divided by $148,000 in fines equals 1.35 or 135%)." Assuming for the sake of discussion only that 1.35 is the appropriate multiplier, we have calculated that penalty assessments of $136,350 should be added to the $101,000 in fines, for a new grand total of $237,350.

Defendants contend the aggregate fines and penalty assessments are unconstitutionally excessive under the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution, which prohibit "excessive fines." As we understand their contention, defendants are not challenging the fine imposed under any single statute, rather they appear to focus primarily on the state's abuse of its prosecutorial power by investigating and charging them in a manner which

unfairly resulted in multiple counts, fines and penalty assessments.

As defendants point out, however, there is a dearth of authority on the excessive fines clause. As stated in defendants' opening brief, "the United States Supreme Court 'has never considered an application of the Excessive Fines Clause. . . . ' ([*Browning-Ferris Industries v. Kelco Disposal* (1989)] 492 U.S. [257,] 262.)" Defendants further stated: "The cases exploring the contours of article I, section 17, of the California Constitution are likewise rare."

People v. Magoni (1925) 73 Cal.App. 78, a prohibition era case, involved two counts of unlawful sales of alcohol. The defendant contended on appeal that, among other things, the two $1,000 fines on each count violated article I, section 17 of the California Constitution. The Court of Appeal rejected her contention after citing the following principles from volume 16 of Corpus Juris at page 1358: " 'In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. A statute does not violate the constitutional provision prohibiting excessive fines or the imposition of cruel and unusual punishments, because it authorizes a fine to be imposed for each sale of liquor without a license, for each act of extortion in charging excessive freight rates, for each animal one unlawfully may have in his possession, or for each day the statute is violated, or because it makes the deposit of

each letter in a scheme to defraud a separate offense, even though the fine in the aggregate amounts to a large sum, since the punishment thus imposed is not the fault of the law but of the one who violates it.' " (*People v. Magoni, supra,* 73 Cal.App. at pp. 80-81.)

We find the above quotation instructive. In this case, the state sent undercover agents into the clinic on only two separate dates, February 27 and March 4, 1988. We do not believe the scope of the undercover investigation was unwarranted or excessive, or that the investigation was unduly lengthy. The fact that the undercover investigation revealed multiple statutory violations does not prove the investigation or the resulting charges, convictions, and fines were unconstitutionally excessive. Neither does the fact that the fines in the aggregate amounted to $101,000 (or $237,350 with penalty assessments) establish a violation of the excessive fines clause, " 'since the punishment thus imposed is not the fault of the law but of the one who violates it.' " (*People v. Magoni, supra,* 73 Cal.App. at p. 81.)

We distinguish *In re Lynch* (1972) 8 Cal.3d 410, 420-424, which held the aggravated penalty for a second conviction of indecent exposure (one year to life in state prison) to be violative of the state constitution's prohibition against cruel and unusual punishment. In reaching this decision, the Supreme Court warned that courts should not lightly find a particular punishment to be disproportionate to the offense. The courts "should not interfere in [the legislative] process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to

violate the prohibition against cruel or unusual punishment." (*Id.* at p. 424.) This case, unlike *Lynch*, does not involve a challenge to a single punishment prescribed by the Legislature.

We also find no support for defendants' position in *People v. Djekich* (1991) 229 Cal.App.3d 1213, which, as defendants acknowledge, did not address the excessive fines clause because the defendant did not raise the issue.

Recognizing the lack of authority for their position, defendants have turned to other jurisdictions. In particular, defendants rely on *State v. Starlight Club* (1965) 406 P.2d 912, a liquor sale violation case, in which the Supreme Court of Utah found the multiple fines imposed below violated the prohibition against excessive fines in the Utah Constitution. The Utah Supreme Court found that under the "circumstances *of this particular* case the constitutional prohibition against excessive fines means something." (*Id.* at p. 915.) But as the Utah court took pains to note, the undercover investigation in that case was conducted on different occasions by the *same* police officer and wife team. The officer's wife gained the confidence of the waitress at the defendant club and induced her to sell a drink to the officer and the wife. This was repeated on three consecutive Friday nights. The Utah Supreme Court concluded that the "gathering of this evidence, in this particular case, was really one episode designed to terminate defendant's charter, remove what someone thought to have been a loose operation in violation of the statute, and that really but one mission, not three, was accomplished." (*Id.* at p. 914.) Consequently, the court deemed it sufficient that the defendant suffer

the maximum penalty of forfeiting its charter, and concluded that only one maximum fine of $2,500 was warranted.

It is not clear whether the Utah court would have reached the same result had the investigation been conducted by different undercover agents who discovered several types of statutory violations. Accordingly, that decision is distinguishable from this case, where the defendants not only defrauded Medi-Cal, they also defrauded their patients and violated licensing statutes by having unlicensed individuals provide medical care, prescriptions, and drugs. Accordingly, *State v. Starlight Club, supra,* 406 P.2d 912, is not persuasive authority.

Defendants further contend, citing foreign authorities, that the fines and penalties are unconstitutionally excessive because they are out of proportion to their ability to pay, and are nearly equal to their entire net wealth. We note, however that we have reduced the total fines and assessments from $347,800 to $237,350.

The prosecution rebuts the defendants' contention of their inability to pay by referring to testimony that Dr. Gandotra's clinic received about $722,000 from Medi-Cal over a three-year period. Defendants reply that this testimony was speculative and that there was no proof that the clinic fraudulently obtained any money from Medi-Cal other than the much more modest sums of $1,069.72 involved in counts 11 through 15 (Medi-Cal fraud) and $8,700 in count 16 (grand theft).

But even assuming the record lacks evidence of the defendants' ability to pay, the defendants are not challenging any single statute on the ground that its lack of

such an evidentiary requirement renders the statute invalid. The Legislature did not make proof of ability to pay a requirement under any of the applicable statutes, but it has done so in other situations. (E.g., compare and contract Pen. Code, § 1464, which imposes a state penalty of $10 for every $10 of certain fines without requiring proof of ability to pay, with Pen. Code, § 1203.1b, which requires a determination of the defendant's ability to pay probation costs.)

Moreover, defendants are not claiming that they will be precluded from introducing evidence of hardship or inability to pay at some later hearing, such as a probation violation hearing. (See, e.g. Pen. Code, § 1464, subd. (d), which gives the trial court discretion to strike the state penalty if the defendant is imprisoned until the penalty is paid and the payment of the fine would work a hardship on the defendant or his immediate family.)

Defendants acknowledge the absence of any controlling authority for their final contention that the fines imposed in this case violated the due process clause of the state and federal constitutions. Defendants refer to recent civil cases addressing the limits imposed by the due process clause on punitive damages (citing *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. ___ [113 L.Ed.2d 1, 111 S. Ct. 1032]; *Browning-Ferris Industries v. Kelco Disposal* (1989) 492 U.S. 257, 276-277; *Adams v. Murakami* (1991) 54 Cal.3d 105, 116-118), and state that "there is no reason that a criminal defendant should be entitled to less consideration of anticipated financial ruin than a civil litigant."

In support of their novel theory, defendants again refer to the conflicting evidence of their monthly income of $90,000 (as stated in the first probation report), or annual income of $90,000 (as stated by their attorney at the sentencing hearing where he apparently introduced their income tax returns). Defendants also maintain the prosecution proved only that they had defrauded Medi-Cal of about $10,000 (counts 11-15 and 16), rather than $722,000 (the total amount of Medi-Cal payments obtained over the course of about three years). Defendants assert the trial court's failure to resolve these evidentiary conflicts indicates the fines imposed did not result from an exercise of *informed* discretion.

We disagree. The trial court stated that "[t]his conduct continued over a period of four years, five years possibly, where he hired doctors, and mainly my recollection all were from Mexico, who were licensed to practice in Mexico, and where they administered or gave treatment under his care." While the defendants correctly note that the trial court did not also expressly state that fraudulent bills had been submitted during the four or five-year period, we think that is plainly what the court meant. The record supports the inference that Medi-Cal payments were fraudulently obtained for several years before the investigation when services were also being provided by unlicensed personnel.

But in any event, the defendants do not contend that the applicable statutes by which the fines and penalties were imposed are violative of due process. As previously indicated, none of the applicable statutes requires proof of ability to pay as a prerequisite to imposing the fine.

Moreover, defendants do not contend they will be precluded from introducing evidence of hardship or inability to pay at some later date.

We do not believe the defendants were denied due process of law. The defendants raised the issue of the conflicting evidence on income at the sentencing hearing, and the trial court fairly ruled against them. This was not a case of unlimited or arbitrary judicial discretion. Under these facts, we believe the defendants were amply protected by the provisions of section 654 and that any responsibility for the imposition of multiple fines rests with defendants rather than the prosecution, judiciary, or Legislature.

DISPOSITION

We modify the judgment against Dr. Gandotra by staying the fines and penalty assessments imposed on counts 2, 5, 7, 9 and 11 through 15, and direct the trial court on remand to recalculate the new total of fines and assessments owed. As modified, the judgments against both defendants are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

ORTEGA, J.

We concur:

SPENCER, P. J.

VOGEL, J.